SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 220

GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, PETITIONER,

vs.

ROAD IMPROVEMENT DISTRICT NO. 2 OF POINSETT COUNTY, ARKANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(30,339)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 389

GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, PETITIONER,

vs.

ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] CAPTION—Omitted

[fol. 1] **IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION**

THE GUARDIAN SAVINGS & TRUST COMPANY, Plaintiff,

vs.

ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS, et al., Defendants

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby agreed between counsel for plaintiff and defendants, the Honorable Jacob Trieber, United States District Judge, who presided at the trial of said cause consenting, that the following shall constitute the record in said cause on appeal to the United States Circuit Court of Appeals for the Eighth Circuit. This June 28th *of June* 1923.

(Signed) R. D. Ashley, Gautney & Dudley, J. F. Gautney, Attys. for Defts. G. B. Rose, for Plf.

IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Aug. 15, 1922

The plaintiff is a corporation duly organized and doing business [fol. 2] under the laws of the State of Ohio, while the defendant is a quasi-municipal corporation, duly organized and existing under the laws of the State of Arkansas, and domiciled in Poinsett County, in this Division of this District; being created by Act #322 of the Acts of the General Assembly of the State of Arkansas, of the year 1919, entitled "An Act to create Road Improvement District Number Seven of Poinsett County, Arkansas," approved March 21st, 1919, which act was amended by Act #45 of the Extraordinary Session of the said General Assembly of the year 1920, entitled "An Act to amend Act #322 of the Acts of the General Assembly of the State of Arkansas of the year 1919, entitled 'An Act to create Road Improvement District Number Seven of Poinsett County, Arkansas, and to confirm the assessment of benefits in said Road Improvement District," approved February 4th, 1920.

Said District made its plans for the improvements and its assessment of benefits, as provided by said Acts; and on the 1st day of April, 1919, it issued its negotiable bonds to the amount of $230,000.00, which have been sold upon the public markets of the world, and are now in the hands of innocent holders, who have paid value

therefor in good faith before maturity and without notice of any defect therein. By the terms of said bonds it is recited, This bond and the attached interest coupons, as well as all other bonds and coupons forming a part of this issue, are payable out of the proceeds of taxes heretofore legally levied upon the real property, railroads and tramroads embraced within said district, and benefitted by said improvement, and are secured by a prior lien on all of said real property, railroads and tramroads.

"The Road Improvement District hereby covenants that said District is duly and legally existing as a road improvement district under the constitution and laws of the State of Arkansas; that the real property, railroads and tramroads within said district have been duly assessed for the making of said improvement; that all acts, conditions and things required to be done precedent to and in the issuing of the bond, including the organization of said district, the adjudication of the benefits against the real property, railroads and tramroads therein, and the levying of the road assessment tax, have been done, have happened and have been performed in regular and due form, as required by law; and that the total amount of bonds issued by said district, with interest thereon, including this bond, does not exceed the available benefits assessed, or any statutory or consti-
[fol. 3] tutional limitation. For the faithful performance of all covenants, recitals and stipulations herein contained, for the proper application of the proceeds of the taxes heretofore or hereafter levied, and for the faithful performance in apt time and manner of every official act necessary to provide for the prompt payment of the principal and interest of this bond, as they mature, the full faith, credit assessed benefits heretofore or hereafter assessd, and all recourses of said Road Improvement District, are hereby irrevocably pledged." And the purchasers of said bonds purchased the same upon the faith of said recitals.

In order to secure the payment of said bonds, the defendant executed its pledge and mortgage, by which it conveyed to the plaintiff, as trustee for the said bond-holders, its entire benefits with all its other resources and assets of every description.

A copy of said pledge and mortgage, which embraces the form of said bonds, is herewith filed as Exhibit "A" and made a part hereof.

By the terms of the act creating said District, it is provided that in case of default for more than thirty days in the payment of the interest or principal of any of said bonds, a receiver shall be appointed to take charge of the affairs of said District. The interest due on said bonds, on the 1st of March, 1922, amounting to $6,900.00 has not been paid, and the plaintiff is, therefore, by the terms of said pledge and mortgage, entitled to demand the appointment of a receiver to take charge of the affairs of the defendant district.

In a certain cause pending in the Chancery Court of Poinsett County, Arkansas, wherein the Weona Land Company and others were plaintiffs, and the commissioners of the defendant district and others were defendants, such proceedings were had that on the — day of July, 1922, a decree was entered by which the assessment securing said bonds was set aside, and the defendant enjoined from

paying out any moneys in its hands. A copy of said decree is herewith filed as Exhibit "B," and made a part hereof.

The plaintiff is advised that there are large sums of money in the hands of said district on deposit in sundry banks in the State of Arkansas, and on [depos-t] with Otis & Company, of Cleveland, Ohio, purchasers of said bonds, which said sum of moneys should be [fol. 4] cared for and applied to the payment of said bonds, if the setting aside of said assessment is to stand. Neither the plaintiff nor any of the bondholders was a party to said suit, and the said decree is in no way binding upon the plaintiff or said bondholders; but the result thereof is to destroy the only security that the bondholders have for the payment of their debt, since said decree enjoins the collection of any taxes in said District. And unless this Honorable Court intervenes for their protection, the said bondholders must suffer the loss of their debts.

The plaintiff, therefore, prays for process of subpœna against the said Road Improvement District Number Seven, of Poinsett County, Arkansas; that a Receiver be appointed to take charge of the affairs of the defendant district; that any moneys on hand belonging to said district be applied to the payment of said bonds and the coupons thereto attached; that taxes be collected by said Receiver and applied to the payment of said bonds and coupons thereto attached, and for such other relief as may be deemed equitable.

Rose, Hemingway, Cantrell & Loughborough, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT

By way of amendment to Bill of Complaint herein, the plaintiff says:

That the defendant has paid the interest accruing on said bonds on the first day of September, 1921, and the first day of March, 1922; and that said bonds have passed from hand to hand through a succession of innocent purchasers upon the faith of the payment of interest as aforesaid; and that said defendant has, therefore, become estopped to dispute the validity of said bonds, or of the pledge and mortgage given for their security.

Rose, Hemingway, Cantrell & Loughborough, Attorneys for Plaintiff.

EXHIBIT "B" TO AMENDMENT

No. 1353

WEONA LAND COMPANY, a Corporation; NORTHERN OHIO COOPERAGE Company, a Corporation; Memphis Band Mill Company, a Cor-[fol. 5] poration; Chapman & Dewey Land Company, a Corporation; Kansas City & Memphis Farms Company, a Corporation; John B. Claunch, C. A. Rushing, E. P. Burton, J. A. Bradsher, W. E. Pittman, W. H. Alcorn, S. W. Sterling, W. G. Bradshaw, W. P. Cooper, O. D. Morris, Charles Cummins, J. W. Wheeler & Company, a Corporation, Plaintiffs,

vs.

ROAD IMPROVEMENT DISTRICT NUMBER SEVEN OF POINSETT COUNTY, Arkansas; B. F. Rogers, C. A. Blanton, and H. B. Thorn, as Commissioners of said Road District No. 7; The McWilliams Company, a Corporation; First National Bank of Marked Tree, Arkansas, a Corporation; Farmers & Merchants Bank of Marked Tree, Arkansas, a Corporation; Otis & Company, and W. D. Shelton, Sheriff and Collector of Poinsett County, Arkansas, Defendants.

Decree

This cause came on to be heard in open court, plaintiffs being present by their attorneys, J. F. Gautney, Joe Brinkerhoff, Henry D. Ashley, O. N. Killough, G. B. Webster and Allen Hughes, and defendants, Road Improvement District No. 7 and the Commissioner thereof, being present by their attorneys, Lamb & Frierson and L. C. Going, and The McWilliams Company being present by its attorney L. C. Going, and defendant, W. D. Shelton, Sheriff and Collector of Poinsett County, Arkansas, though duly served with process summons herein, come not but made default, and this cause is submitted upon the original complaint filed herein on January 12, 1921, answer of defendant Road District No. 7, and the Commissioners thereof, thereto; temporary restraining order issued by W. W. Warren, County Judge, on January —, 1921; motion by defendant district to dissolve same, and Chancellor's order thereon, amended complaint and amendment to the amended complaint of plaintiffs, demurrer and answers of defendants, Road Improvement District, and the Commissioners thereof, and The McWilliams Company thereto, motion of said defendants to strike certain evidence, motion to dissolve the temporary restraining order, stipulation of counsel dated December 17, 1921, signed by J. F. Gautney and Allen Hughes, attorneys for plaintiffs, L. C. Going and Chas. D. Frierson, attorneys for defendants, copy of County Court Record "H," Poinsett County, Arkansas, July Term, 1919, page 517 and following depositions taken January 28, 1921, on mo-[fol. 6] tion to dissolve temporary restraining order, as follows: C. J. Mitchell, A. H. Landers, D. W. Morrison, B. F. Rodgers, H. B. Thorn, C. A. Blanton, J. A. Norton, H. P. Maddox, on behalf of

defendants: W. H. Alcorn, Joe Brinkerhoff, J. A. Bradsher, T. G. Staton, E. W. Tschudy, W. E. Pittman, H. Coldren and W. B. Chapman, on behalf of plaintiffs, depositions on behalf of plaintiffs taken at Marked Tree, Arkansas, July 14, 1921, as follows: C. C. Cummins, R. Nicewander, J. G. Haverstick, W. P. Cooper, George Hirschman, W. G. Bradshaw, W. L. Turnbow, T. G. Staton, W. H. Alcorn, A. Basier, W. E. Pittman, and the depositions on behalf of plaintiffs, taken in Memphis, Tennessee, July 1, 1921, as follows: Deposition of W. A. Lunsford and Exhibit "A" thereto, deposition of N. H. Sayford, and Exhibits "A," "B," "C," "D," "E," "F" and "G" thereto, depositions of John E. Buxton, Exhibit "A" to depositions of H. P. Maddox, depositions on behalf of defendants, taken in Memphis, November 25, 1921, as follows: Joe P. Pride, Exhibits "A" and "B" thereto, R. C. Fergus, W. P. Laster, Henry Coldren and H. B. Thorn, depositions taken on behalf of defendants March 13, 1922, as follows: Willis Ayres, and Exhibits "A" thereto, W. O. McMillan, minute book of Road Improvement District No. 7, filed May 9, 1922, original plans and specifications of Road Improvement District No. 7, filed in the office of the County Clerk, December 16, 1919, assessment of benefits, Road Improvement District No. 7 filed in the office of the County Clerk on December 16, 1919 revised plans and specifications, Road Improvement District No. 7, made exhibits "A" and "B" to the deposition of Joe P. Pride, filed in the office of the County Clerk of Poinsett County, Arkansas, on the 13th day of November, 1921, and order of county court approving the same, from which the court finds:

That the plans and specifications and assessment benefits filed in the office of the County Clerk of Poinsett County, Arkansas, on December 16, 1919, and confirmed by Special Act of the Extra-Ordinary Session of the General Assembly of the State of Arkansas, which act was approved February 4, 1920, and said act of said legislature approving and confirming said plans and specifications and assessment of benefits as aforesaid, as well as the revised plans and specifications filed in the office of the County Clerk on the 13th day of November, 1921, and each of them, are void: for the reasons: First, that there was a material change in the plans beyond the authority of the district or of the County Court; second, that the floodway [fol. 7] of Drainage District Seven of Poinsett County has taken out approximately 3,000 acres of land originally assessable for road improvement, and the court finds the issues in favor of the plaintiffs.

It Is, Therefore, considered, ordered, adjudged and decreed that said plans and specifications and assessment of benefits in said Road Improvement District No. 7 filed in the office of the County Clerk of Poinsett County, Arkansas, December 16, 1919, and the Act of the Extraordinary Session of the General Assembly of the State of Arkansas, for the year 1920, which Act was approved February 4, 1920, be and the same are hereby adjudged to be void for the reasons aforesaid, and that the same be and are hereby annulled and set aside.

That said Road Improvement District No. 7, and the Commissioners thereof, to-wit: C. A. Blanton, H. B. Thorn and B. F. Rodgers,

as Commissioners thereof, be and they are hereby separately and severally enjoined from collecting or attempting to collect any taxes which may have been assessed against the real estate in said Road Improvement District No. 7 by virtue of said assessment of benefits hereinbefore mentioned; that they be further enjoined from expending, or paying out, any moneys which have heretofore been collected as taxes from the real property situate in said Road Improvement District No. 7, or received from the sale of bonds of said district, to any persons, firms or corporation; and from drawing any warrants or paying any bills, appropriating or using or otherwise disposing of any moneys that may have come into the hands of said Commissioner of said Road Improvement District from the sale of the bonds, or from payment of taxes of said district, and which may now be in their hands as such Commissioner, or which may be deposited to the credit of said Road Improvement District in the First National Bank of Marked Tree, Arkansas, or the Farmers & Merchants Bank of Marked Tree, Arkansas, or any other bank or banking house in which said funds may be deposited.

That said Road Improvement District, its Commissioners, attorneys, agents and servants be, and they are hereby enjoined from constructing or attempting to construct any work or improvement in said district, expending any of the moneys of said district, or incurring any obligations for or on behalf of said district.

That W. D. Shelton, Sheriff and Collector of Poinsett County, be and he is hereby enjoined from collecting or undertaking to collect any taxes under said assessment of benefits hereinbefore described. [fol. 8] and from paying over to the Commissioners of said Road Improvement District, or to the Treasurer or Secretary of said Road Improvement District any funds now in his hands, which have been collected by him as such sheriff and collector as taxes in said Road Improvement District.

That defendant, The McWilliams Company, a corporation, be, and it is hereby enjoined from further proceeding to fulfill the alleged contract entered into between it and said Road Improvement District for the construction of the improvement thereon. That it be enjoined from receiving, and the Commissioners of said Road Improvement District, their officers, attorneys and servants, be, and they are hereby enjoined from paying to said McWilliams Company any money now in their hands, or on deposit to the credit of said Road Improvement District, for or on account of said contract, or upon any sum that may be owing by said Commissioners to said McWilliams Company for or on account of the alleged contract. That said Sheriff and Collector be enjoined from paying to said McWilliams Company, its agents, attorneys, servants or employees, or to any other persons representing The McWilliams Company, Road Improvement District No. 7, or the Commissioners thereof, any moneys now in his hands, which have been collected by him as improvement district taxes in said district.

That said Road Improvement District and the Commissioners thereof be enjoined from contracting further work in said district,

or from the payment of any moneys belonging to said district, or incurring and other or further obligations for or on behalf of said district. That defendants pay all costs herein.

The court further finds that bonds have been issued and neither the bondholders nor the Trustee are parties to this cause, nor have they appeared in any way, and, therefore any and all rights claimed by said bondholders or the Trustee can not be affected by this decree, and all rights in their behalf remain undisturbed, and this decree is not intended to bar or affect such claims, the same not being adjudicated herein.

To all of which said defendants except, and pray an appeal to the Supreme Court, which is granted.

[fol. 9] STATE OF ARKANSAS,
County of Poinsett:

I, T. T. Mardis, Clerk of the Circuit Court within and for the county and state aforesaid, do hereby certify that the above and foregoing pages of typewritten matter contains a true, correct and complete copy of the Decree rendered in the case of Weona Land Company, et al., against Road Improvement District No. 7, et al., as the same now appears of record in Chancery Court Record "F," page 577.

Witness my hand as such clerk, and the seal of such Court, of this August 2, 1922.

—— ——, Circuit Clerk.

EXHIBIT "A" TO AMENDMENT

Know All Men by These Presents:

That Road Improvement District Number Seven of Poinsett County, Arkansas, has executed its coupon bonds, payable at the Chase National Bank, in the City of New York, New York, as follows:

No. of bonds		Amount	Maturity
1 to 8, inclusive	.....	$8,000	September 1, 1925
9 " 17, "	.....	9,000	" 1, 1926
18 " 26, "	.....	9,000	" 1, 1927
27 " 36, "	.....	10,000	" 1, 1928
37 " 46, "	.....	10,000	" 1, 1929
47 " 57, "	.....	11,000	" 1, 1930
58 " 69, "	.....	11,000	" 1, 1931
70 " 81, "	.....	12,000	" 1, 1932
82 " 94, "	.....	13,000	" 1, 1933
95 " 108, "	.....	14,000	" 1, 1934
109 " 123, "	.....	15,000	" 1, 1935
124 " 139, "	.....	16,000	" 1, 1936
140 " 156, "	.....	17,000	" 1, 1937
157 " 174, "	.....	18,000	" 1, 1938
175 " 193, "	.....	19,000	" 1, 1939
194 " 213, "	.....	20,000	" 1, 1940
214 " 230, "	.....	17,000	" 1, 1941

all of said bonds bearing date of April 1, 1919, and bearing interest at the rate of six per cent per annum, interest payable semi-annually on the first day of March and September in each year, as evidenced [fol. 10] by the coupons attached to said bonds; said bonds and interest coupons being in substantially the following form, except as to maturities:

United States of America, State of Arkansas, County of Poinsett

Road Improvement District Number Seven

6% Improvement Bond

No. —. $1,000.00.

Know all men by these presents:

That Road Improvement District Number Seven of Poinsett County, and State of Arkansas, acknowledges itself to owe and for value received hereby promises to pay to bearer the sum of One Thousand Dollars, in gold coin of the United States of America, of the present standard of weight and fineness, on the first day of September, 19—, with interest thereon from the 1st day of April, 1919, until paid, at the rate of six per cent per annum, interest payable semi-annually on the first day of March and September of each year, on presentation and surrender of the annexed interest coupons as they severally mature.

Both principal and interest of this bond are hereby made payable at the Chase National Bank, in the City of New York, and State of New York.

This bond is one of a series of like tenor and effect, except as to maturity, aggregating Two Hundred and Thirty Thousand Dollars ($230,000.00), and numbered from one (1) to two hundred and thirty (230), inclusive, issued for the purpose of improving roads in said district, under and in full compliance with the constitution and laws of the State of Arkansas, including among others Act #322 of the General Assembly of the State of Arkansas on the year 1919, entitled "An Act to Create Road Improvement District Number Seven of Poinsett County, Arkansas," approved March 21, 1919, and Act No. 45 of the Extraordinary Session of the said General Assembly of the year 1920, entitled "An Act to Amend Act No. 322 of the Acts of the General Assembly of the State of Arkansas of the year 1919, entitled 'An Act to Create Road Improvement District Number Seven of Poinsett County, Arkansas,' and to confirm the assessment of benefits in said Road Improvement District," approved February 4, 1920, and under and in full compliance with orders, resolutions and proceedings of the Commissioners of said Road Improvement District Number Seven, duly and legally had and adopted.

[fol. 11] This bond and the attached interest coupons, as well as all other bonds and coupons forming a part of this issue, are payable out of the proceeds of taxes heretofore legally levied upon the real property, railroads and tramroads embraced within said dis-

trict, and benefited by said improvement, and are secured by a prior lien on all of said real property, railroads and tramroads.

The Road Improvement District hereby covenants that said District is duly and legally existing as a road improvement district, under the Constitution and laws of the State of Arkansas; that the real property, railroads and tramroads within said district have been duly assessed for the making of said improvement; that all acts, conditions and things required to be done precedent to and in the issuing of this bond, including the organization of said district, the adjudication of the benefits against the real property, railroads and tramroads therein, and the levying of the road assessment tax, have been done, have happened and have been performed in regular and due form, as required by law; and that the total amount of bonds issued by said district, with interest thereon, including this bond, does not [*excess*] the available benefits assessed, or any statutory or constitutional limitation. For the faithful performances of all covenants, recitals and stipulations herein contained, for the proper application of the proceeds of the taxes heretofore or hereafter levied, and for the faithful performance in apt time and manner of every official act necessary to provide for the prompt payment of the principal and interest of this bond as they mature, the full faith, credit, assessed benefits heretofore or hereafter assessed, and all resources of said Road Improvement District are hereby irrevocably pledged.

This bond shall not be valid until it shall have been authenticated by the certificate hereon duly signed by The Guardian Savings and Trust Company, of Cleveland, Ohio.

In witness whereof, Road Improvement District Number Seven of Poinsett County, Arkansas, has caused this bond to be signed by all the members of its Board of Commissioners, attested by its corporate seal, and has caused the interest coupons thereto attached to be exe-
[fol. 12] cuted by the facsimile signature of the Chairman of its Board of Commissioners, as of the 1st day of April, 1919.

Road Improvement District Number Seven of Poinsett County, Arkansas, by —— ——, Commissioners.

Coupon

No. —. $30.00.

On the 1st day of March, September, 19—, Road Improvement District Number Seven of Poinsett County, Arkansas, promises to pay to bearer Thirty Dollars, at the Chase National Bank, in New York, New York, being six months' interest then due on its bond dated April 1, 1919, and numbered —.

—— ——, Chairman.

On the back of said bonds shall appear the following:

Certificate

This is to certify that this bond is one of a series of 230 bonds of like tenor and effect, except as to maturities, mentioned and described on the face hereof.

The Guardian Savings & Trust Company, by —— ——.

Cleveland, Ohio, —— —, 1920.

(The first coupon attached to each bond shall be for 11 months' interest, due March 1, 1920, $55.00.)

Now, Therefore, in consideration of the sum of One Dollar, and other good and sufficient considerations, and for the purpose of further securing the payment of each and all of the aforesaid bonds and the interest coupons thereto attached, as they severally mature, said Road Improvement District Number Seven of Poinsett County, Arkansas, doth hereby pledge, assign, transfer, mortgage and set over to the said The Guardian Savings and Trust Company, of the City of Cleveland, and State of Ohio, as Trustee, the property and revenues of the district, including all uncollected assessments levied by this Board and by the County Court of Poinsett County, on the [fol. 13] real property, railroads and tramroads in said district, together with all assessments that may hereafter be levied thereon, and in case any property owner makes default in the payment of any assessment, it is agreed that said Trustee, in behalf of the holders of said bonds hereby secured, may take all steps, whether by suit in chancery or mandamus, for the enforcement of the rights of the holders of said bonds that are granted to the said holders or to this Board by the terms of said Acts of the General Assembly of the State of Arkansas referred to in said bonds.

Provided, however, that when the amount appropriated by the Board of Commissioners out of any annual assessment of taxes sufficient to pay the interest and principal of the bonds hereinbefore referred to coming due in the ensuing year, and to pay any installment of interest or principal which may be past due and unpaid, has been set aside and paid over to the Treasurer of said district, and by him deposited with the Chase National Bank, of New York, New York, for the purpose of paying said principal and interest, the Board of Commissioners may thereupon appropriate any money remaining out of its revenues for that year for any other lawful purpose, provided the said appropriation does not reduce the amount that will be realized from any subsequent annual below what is necessary to pay the maturities of principal and interest of the bond issue maturing *fir* that and subsequent years; the intention of this p-edge being to give the bond holders a first and preferred lien upon all taxes levied and to be levied, and upon the entire revenues of the district from whatever source derived, and to permit the Board of Commissioners to appropriate for other lawful purposes only the surplus re-

maining out of the revenues of the particular year after provision has been made for interest and principal maturing in the ensuing year, and for all delinquencies of interest and principal.

Said district further agrees that if default takes place in payment of any of the bonds or coupons, there shall be paid to the said Trustee out of the proceeds of said assessment, and before the payment of interest and principal, of said bonds, a reasonable compensation to the Trustee and such counsel as the Trustee may find it necessary to employ.

In case the Trustee refuses to act, resigns or ceases to exist, the holder or holders of a majority of the bonds aforesaid may, by an instrument filed in the office of the Recorder of Deeds in Poinsett County, Arkansas, appoint a new Trustee, who shall have all the rights and powers of the Trustee herein named.

[fol. 14] The district further agrees that if default is made in the payment of any interest coupon, the holder of the bond thereto attached may declare the same immediately due and payable.

The bonds hereby secured shall bear interest at the rate of six per cent per annum after maturity.

The said Trustee shall be entitled to reasonable compensation for all services performed and reimbursement for expenses incurred in the performance of its duties under this trust. Said Trustee shall be responsible only for wilful misconduct in the execution of its trust. The recitals of facts contained in said bonds and in this instrument are statements of the said district, and shall not be considered as made by the Trustee. The Trustee shall not be required to see that this pledge is properly executed or recorded, nor shall it be required to take notice or be deemed to have notice of any default of the said Road Improvement District, unless it shall have been indemnified to its satisfaction by the holder or holders of the bonds above mentioned, or some of them, against loss or expense by reason of taking such action.

The District will pay the cost of recording and satisfying this pledge.

The said Trustee shall have the right to resign as Trustee at any time by giving the Board of Commissioners of the district written notice of its resignation thirty days prior to the taking effect thereof.

In witness whereof, the said Road Improvement District Number Seven of Poinsett County, Arkansas, has caused this instrument to be executed under the hands of its commissioners, and under its corporate seal, on this 18th day of May, 1920.

Road Improvement District Number Seven of Poinsett County, Arkansas, by H. B. Thorn, C. A. Planton, B. F. Rogers, Commissioners. (Corporate Seal.)

STATE OF ARKANSAS,
County of Poinsett:

On this 18th day of May 1920, before me, a Notary Public, duly commissioned, qualified and acting and for the said county and state, [fol. 15] appeared B. F. Rogers, C. A. Blanton and H. B. Thorn,

the commissioners of Road Improvement District Number Seven, being the persons authorized by said district to execute such instrument, to me personally well known, who stated that they were the commissioners of said Road Improvement District Number Seven and were duly authorized in their respective capacities to execute the foregoing instrument for and in behalf of said district; and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

In testimony whereof, I have hereunto set my hand and official seal, this 18th day of May 1920.

(Signed) A. B. Caplinger. Notary Public. My commission will expire: May 28, 1923. (Seal.)

Certificate of Record

STATE OF ARKANSAS,
County of Poinsett:

I, A. H. Landers, Clerk of the Circuit Court and Ex-Officio Recorder of the County and State aforesaid, do hereby certify that the within instrument of writing was filed in my office for record on the 22nd day of May 1920, and is now recorded in Record of Mortgages, Book 7, Page 177.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office, this 25th day of May 1920.

(Signed) A. H. Landers, Clerk & Recorder, by —— ——, Deputy Clerk. (Seal.)

(On back of cover of pledge:) Road Improvement District Number Seven of Poinsett County, Arkansas to The Guardian Savings & Trust Company, Trustee, Cleveland, Ohio. Pledge. Filed for Record May 22, 1920. (Signed) A. H. Landers, Clerk.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Sept. 18, 1922

Defendants Weona Land Company, a corporation, Northern Ohio Cooperage & Lumber Company, a corporation, Memphis Band Mill Company, a corporation, Chapman & Dewey Land Company, a corporation, Kansas City & Memphis Farms Company, a corporation, John D. Launch, E. P. Burton, J. A. Bradsher, W. E. Pittman, W. H. Alcorn, S. W. Sterling, Adam Basier, W. O. Cooper, R. W. Denton, S. S. Denton, C. C. Cummings, J. W. Wheeler & Company, a corporation, Wilmar Smith, J. D. Dubard, C. E. Causey, M. W. Hazel, Anderson-Tully Company, C. C. Sloan, Farmers & Merchants Bank of Marked Tree, Arkansas, a corporation, for their joint answer say:

They have no information sufficient to form a belief as to whether or not plaintiff is a corporation, or that it is duly organized and doing business under the laws of the State of Ohio, and therefore deny the same.

Admit Road Improvement District No. 7, Poinsett County Arkansas, was attempted to be organized by Act No. 322 of the Acts of the General Assembly of the State of Arkansas, for the year 1919, and admit that at the Extraordinary session of the General Assembly for the year 1920, said General Assembly attempted by Act No. 45 of said session to amend Act No. 322, which amendatory Act was approved February 4, 1920, but deny that said original Act or said amendatory Act created Road Improvement District for the reasons hereinafter alleged.

Deny that said district made its plans for the improvement and assessment of benefits, as provided in said Acts. Deny that on April 1, 1919, it issued negotiable bonds in the sum of $230,000.00, or any other sum; deny that said bonds have been sold upon the public markets; deny that the same are now on the hands of innocent holders; deny that the holders of said bonds have paid value therefor, in good faith or otherwise, before maturity and without notice of defect. Admit that it is provided in the coupons attached to said pretended bonds that same are payable out of the proceeds of [fol.17] taxes heretofore legally levied upon property in said district, and deny that said levy, if any was made, is legal. Admit that said bonds contain the provisions and recitals mentioned in the complaint, but deny that the same were purchased by any person, firm or corporation, upon the faith of any recitals contained therein, and allege that said purchasers had no right to rely upon said recitals, or to place any faith therein.

Admit that a pretended pledge was made by said district to said trustee for the bondholders, and admit that Exhibit "A" is a copy thereof, but deny that said district had any right or authority to execute said pledge, and alleges that said pledge is void for the reasons hereinafter set forth. Admit that by the terms of the Act, if default is made in payment of principal or interest on said bonds, a Receiver may be appointed to take charge of the affairs of said district.

Deny that there was any interest due on said bonds on the 1st day of March, 1922, or at any other time, amounting to $6,900.00 or any other sum, and deny that plaintiff, as trustee or otherwise, is entitled to demand the appointment of a Receiver to take charge of the affairs of the defendant District for the reasons hereinafter alleged.

Admit that in a cause pending in the Chancery Court of Poinsett County, Arkansas, wherein Weona Land Company, et al., were plaintiff, and said district and its commissioners, et al., were defendants, at the May term, 1922, of said court a decree was entered by which the assessment securing said bonds was set aside, and the defendant enjoined from paying out any money in his hands; and say that said decree is now in full force and effect, and has not been

appealed from. These defendants have no information to form a belief as to whether or not the so-called officers of said district, or said district, have on deposit in sundry banks, or in any banks in the State of Arkansas, or on deposit with Otis & Company of Cleveland, Ohio, large sums of moneys, or any sum of money, and allege that no taxes have ever been paid by said district or the land owners therein.

Admit that neither the plaintiff nor any of the bondholders was a party to said suit in the Chancery Court, but allege that it was unnecessary to make said trustee or said bondholders parties therein, in order for said decree to be binding upon said plaintiff and said bondholders. Admit that the result of said decree is to destroy the [fol. 18] security the bondholders have for the payment of their debt, and admit that said decree enjoins the collection of any taxes in said district.

Answering the amendment to the complaint herein, defendants say that they deny that any interest has been paid upon said bonds by said Improvement District, and deny that these defendants are bound by any pretended payment of interest thereon.

Further answering the complaint of the plaintiffs, defendants say that said Act No. 322 pretending to create said Road Improvement District, was and is void for the reason that said Road described in said original act was not a public highway at the time of the passage of said Act, and had not been laid out and established by the County court of Poinsett County, Arkansas, in manner and form prescribed by law, prior to the passage of said Act.

2. That the pretended assessment of benefits in said district was not filed with the County Clerk of Poinsett County, by said Board or its Secretary, and that the Secretary of said Board did not give notice of the filing of said pretended assessment of benefits by publication thereof for two weeks in any newspaper published in Poinsett County, Arkansas, or having a circulation therein, in manner and form prescribed by said Act No. 322.

3. Said Commissioners did not meet at any time or place for the purpose of hearing complaints against said pretended assessments and to equalize and adjust the same.

4. Defendants allege that no assessment of benefits was ever filed by said commissioners or the Secretary of said Board of Commissioners of said Road Improvement District in the office of the County Clerk of Poinsett County, Arkansas, and deny that the Board of Commissioners of Road Improvement District No. 7 ever made an assessment of benefits in said district.

5. Defendants allege that Act No. 45, hereinbefore mentioned, approved February 4, 1920, was and is void for the following reasons: Prior to the pretended creation of Road Improvement District No. 7, Drainage District No. 7 of Poinsett County, Arkansas, was created in conformity with Special Acts of the Legislature of the

State of Arkansas, and that the territory pretended to be embraced in Road Improvement District No. 7, is and was embraced in Drainage District No. 7; and prior to the time of the assessment of benefits in Road Improvement District No. 7, and prior to the approval thereof, and prior to the time of the filing of the plans and specifica-
[fol. 19] tions for the construction of the improvement in Road Improvement District No. 7, and prior to the approval thereof, said Drainage District No. 7 filed in the office of the Clerk of Poinsett County, Arkansas, in manner and form prescribed by Act creating said Drainage District No. 7, its plans and specifications for the construction of a system of canals, ditches and drains in Drainage District No. 7 of Poinsett County, Arkansas, along, upon and in the territory now pretended to be included as a part of Road Improvement District No. 7; that said plans and specifications of said Drainage District, filed and approved as aforesaid, called for the construction of a floodway, beginning in the southern part of Township 12 North, Range 6 East in Poinsett County, and traversing in a southwesternly direction the entire territory covered by Road Improvement District No. 7, and crossing the route of the proposed road in Road District No. 7, at or near Sections 24 and 25, Township 11 North, Range 5 East, and Section 30, Township 11 North, Range 6 East, and thence in a southwesterly direction until said floodway intersects the waters of the St. Francis River; that said floodway, as so planned and approved by the order of the county court, in said Drainage District No. 7, appropriates a tract of land 2,640 feet in width for the entire distance mentioned above, and traverses said district for a distance of approximately twelve miles, and when completed will cover approximately six square miles of real estate in said Improvement District, or approximately 3,000 acres; that all of said area was included in said Drainage District and by it appropriated for use in constructing the improvements therein prior to the 4th day of February, 1920. That said floodway improvement consists of two ditches, each of said ditches being 100 feet wide, and extending the entire length of said improvement, and a levy constructed on the land side of said ditch of such height as to hold all of the flood waters of the St. Francis River in said floodway, thereby submerging all of said land between said ditches; and being approximately 3,000 acres as aforesaid, appropriated by said Drainage District for use in the construction thereof. That notwithstanding the plans and specifications for the construction of said floodway had been filed and approved; and said land appropriated by the order of the county court in the manner and form prescribed by the Legislature creating said Drainage District No. 7, by the terms of said Act No. 45, approved February 4, 1920, it is undertaken to impose upon said lands so appropriated, benefits approximating the sum of $70,-000.00, for the construction of the improvement in said Road Im-
[fol. 20] provement District, and without any reference to said appropriation thereof by said Drainage District, thereby undertaking to assess benefits against property belonging to Drainage District No. 7, for the construction of the improvement in said Road Improve-

ment District No. 7. That by reason thereof, said General Assembly, in so undertaking to assess benefits against the real estate in Road Improvement District No. 7, committed a demonstrable error, and that said Act by reason thereof was and is void and of no effect.

It is further provided by Sec. 3 of said Act approved February 4, 1920, that the plans for the construction of said Road heretofore filed by the commissioners of said district are approved and confirmed.

Defendants say that the plans and specifications for said road so approved and confirmed, do not call for the construction of any bridges thereon, nor provide any specifications or plans for any bridges thereon. That by reason of the construction of the floodway in Drainage District No. 7, it will be necessary to construct a bridge upon the said pretended highway, more than one half mile in length, and costing not less than $300,000.00.

That in order to construct the highway according to the plans and specifications pretended to be approved by the Act of the Legislature, that it will require the expenditure of the sum of $750,000.00, and that the total amount of the pretended assessment of benefits in said district is $460,000.00. That by reason of the costs of the improvements exceeding the benefits, said Act of Legislature aforesaid approving said pretended plans and specifications and assessment of benefits in said district was and is void.

Defendants further say that said pretended district as undertaken to be created by said amendatory Act, approved February 4, 1920, undertakes to include within the boundaries of said district 2,400 acres of land lying south and east of the St. Francis River, a navigable stream; that said lands in said pretended district, lying south and east of the St. Francis River are in no manner physically connected with the lands north and east of said river in said pretended district. That said St. Francis River is a navigable stream, and that there are no bridges or ferries thereon within said district, whereby the owners of lands south and east of the St. Francis River may use or have the benefit of any highway which may be constructed within said district; and that said lands do not and will not receive any [fol. 21] benefits by reason of the construction of said pretended improvement, and that said pretended assessment of benefits, in so far as it relates to said lands as aforesaid, is in violation of Sec. 8, Article 2, of the Con-titution of the State of Arkansas, and in violation of the 14th Amendment to the Constitution of the United States.

Further answering the complaint herein, defendants say that no part of said alleged bonds have been sold by said Otis & Company to any person, at any time, but say that all of said bonds are now in the hands of Otis & Company, and that said Otis & Company have not paid or advanced to said district any money whatever on said bonds, but that said Otis & Company by collusion with the commissioners thereof have pretended to advance to said commissioners the sum of $65,000.00; that said Otis & Company, notwithstanding the fact that only a small sum of money has been advanced by them to said commissioners, have been charging in-

terest upon $230,000.00 since the 1st day of September, 1919. That upon an accounting herein, it will be shown that all of said pretended advancements are fraudulent and made by said Otis & Company with knowledge that the payment of taxes in said district had been enjoined in the Chancery Court of Poinsett County, Arkansas.

II

Further answering the complaint, defendants say that in a cause pending in the Chancery Court of Poinsett County, Arkansas, wherein Weona Land Company, et al., were plaintiffs, and Road Improvement District No. 7, et al., were defendants, the complaint of the plaintiff alleged among other things that the organization of said district, the assessment of benefits, and the levy of taxes thereon was void for the reasons that there was not at the time of the creation of said proposed district a public highway along the route described in the Act creating said district, nor had there been established a public highway along the route described in said Act by the order and judgment of the County Court of Poinsett County, Arkansas. That said pretended assessment or benefits within said district and the taxes levied thereon, was void for the reason that the Legislature in attempting to make said pretended assessment of benefits committed a demonstrable error in that, prior to said pretended assessment of benefits, and prior to the 4th day of February, 1920, Drainage District No. 7 of Poinsett County, Arkansas, had been formed by the Act of the General Assembly of the State of Arkansas for the year 1917, and Acts amendatory thereof; and prior to the filing and approval of said pretended assessment of bene-[fol. 22] fits within said district, said Drainage District has appropriated with the territory contained in said Road District, a strip of land approximately 2,640 feet wide and approximately twelve miles in length, containing approximately 3,000 acres, for improvement purposes, and that the lands so appropriated by said Drainage District for improvement purposes within said Road Improvement District could not lawfully be taxed for the construction of said Road Improvement District. That notwithstanding said lands had been so appropriated and said appropriation approved by the order of the county court of Poinsett County, Arkansas, for use in constructing the improvement in said Drainage District, said pretended assessment of benefits, and approval thereof in said Road Improvement District, attempted to assess benefits against said lands so appropriated by said Drainage District for the construction of said improvement in said Road District.

Furthermore said pretended assessment of benefits attempted to assess benefits upon approximately 3,000 acres of land south and east of the St. Francis River, a navigable stream, which lands were entirely disconnected from the other territory in said district by said St. Francis River; that by reason thereof it was impractical, and almost impossible for the land owners in that part of said district south and

east of the St. Francis River, to use the road proposed to be established in said Road Improvement District, and that by reason thereof the assessment of benefits as to said lands where no benefits accrued and could not accrue constituted the taking of property without due process of law and are, therefore, void.

Furthermore that the costs of the proposed improvement in said Road Improvement District would exceed the sum of $750,000.00 and that the total assessment of benefits therein did not exceed the sum of $462,000.00, and that by reason of the costs of the improvement exceeding the benefits assessed against the lands in said district, said pretended assessment of benefits was void.

That upon the hearing of said cause aforesaid in said Chancery Court aforesaid, at its May Term, 1922, a decree was rendered declaring said pretended assessment of benefits and the Act of February 4, 1920, approving the same, and the pretended assessment of taxes thereunder void, and enjoining any further proceedings by said district looking to the collection of any taxes or the construction of any improvement therein. A copy of said decree aforesaid was [fol. 23] filed by plaintiffs as an exhibit to their complaint herein and is hereby referred to and made a part hereof.

That said decree adjudicated the right of said district, and all persons claiming as beneficiaries under it, to assess benefits, levy taxes thereunder, and contract for the construction of improvements therein, for the reasons hereinbefore set forth, and is binding upon the plaintiffs herein; and the defendants, land owners herein, hereby plead said judgment and decree in bar of the rights of the plaintiffs herein, except such right of action as plaintiffs herein may have against the contractor, The McWilliams Company, and against the commissioners of said Road District, as to any funds paid to said commissioners by Otis & Company, or paid by said commissioners to any contractor or other person.

Wherefore having fully answered defendants pray that as to matters herein set forth, said complaint be dismissed for want of equity, and for all proper relief.

(Signed) J. F. Gautney, R. H. Dudley, Attorneys for Defendant Land Owners.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE—Filed June 28, 1923

Be it remembered, that at a District Court of the United States of America in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 2nd day of April Anno Domini, One Thousand, Nine Hundred and Twenty-three at the United States Court Room, in the City of Little Rock,

Arkansas, the Honorable Jacob Trieber Judge presiding and holding said Court, the following proceedings were had, to-wit: on June 28th, 1923: Guardian Savings & Trust Company, as Trustee, No. 2123 vs. Road Improvement District No. 7 of Poinsett County.

It appearing that there was an error in the computation of the amount due in the original decree herein, it is considered, and decreed that said decree be reentered as of its original date, but amended to read as follows:

[fol. 24] This cause coming on for final hearing, comes the plaintiff, by Rose, Hemingway, Cantrell & Loughborough its solicitors, and comes the defendant and intervening property owners authorized to defend in its name, by J. F. Gautney and Henry D. Ashley, their solicitors, and this cause being submitted to the court on the pleadings and exhibits and the depositions of witnesses and the exhibits thereto, and the Court being sufficiently advised in the premises,

It is considered, ordered and decreed that the bond of the defendant district bearing date the first day of April, 1919, and bearing interest at the rate of six percent per annum, interest payable on the first days of March and September of each year, and maturing as follows:

Nos. of bonds	Amount	Maturity
1 to 8, inclusive	8,000.00	September 1, 1925.
9 " 17, "	9,000.00	September 1, 1926.
18 " 26, "	9,000.00	September 1, 1927.
27 " 36, "	10,000.00	September 1, 1928.
37 " 46, "	10,000.00	September 1, 1929.
47 " 57, "	11,000.00	September 1, 1930.
58 " 69, "	12,000.00	September 1, 1931.
70 " 81, "	12,000.00	September 1, 1932.
82 " 94, "	13,000.00	September 1, 1933.
95 " 108, "	14,000.00	September 1, 1934.
109 " 123, "	15,000.00	September 1, 1935.
124 " 139, "	16,000.00	September 1, 1936.
140 " 156, "	17,000.00	September 1, 1937.
157 " 174, "	18,000.00	September 1, 1938.
175 " 193, "	19,000.00	September 1, 1939.
194 " 213, "	20,000.00	September 1, 1940.
214 " 230, "	17,000.00	September 1, 1941.

are the valid obligations of the defendant district and are secured by a first mortgage on the assessment of benefits thereof, which mortgage bears date the 18th day of May, 1920, and was filed for record in the office of the Recorder of Poinsett County, Arkansas, on the 22nd day of May, 1920; and that said mortgage is a first lien upon the assessment of benefits heretofore made by said district, which said assessment of benefits shall stand as the assessment of benefits of the district until a new assessment of benefits satisfactory to this Court shall have been made.

It is further considered, ordered and decreed that for said bonds the purchasers thereof, Otis & Company, have paid the sum of $111,110.00, and that they are entitled to interest upon bonds of [fol. 25] that amount, beginning with the coupons due September 1, 1920, and including the coupons due March 1, 1921, March and September 1, 1922, and March 1, 1923, amounting to $16,666.50; from which there should be deducted an over-payment by the district on account of the September, 1921, coupons, of $3,566.70, the District having itself paid on account of the September, 1921, coupons on the basis of there being $230,000.00 of bonds outstanding; so that there is now due the said Otis & Company the total sum of $124,209.80, for which they are entitled to retain the bonds of the defendant district; and it appearing that they have elected to retain the $125,000.00 of bonds of certain maturities, and to return the remainder, it is considered and decreed that the remainder of said bonds be cancelled by the said Otis & Company and surrendered to the Clerk of this Court.

The bonds retained by the said Otis & Company, and which are hereby ascertained to be the valid obligations of the district are as follows:

Nos. of bonds			Amount	Maturity	
1 to	4,	Inclusive	$4,000.00	September 1,	1925
9 "	13,	"	5,000.00	" 1,	1926
19 "	22,	"	4,000.00	" 1,	1927
27 "	32,	"	6,000.00	" 1,	1928
37 "	42,	"	6,000.00	" 1,	1929
47 "	52,	"	6,000.00	" 1,	1930
58 "	64,	"	7,000.00	" 1,	1931
70 "	75,	"	6,000.00	" 1,	1932
82 "	87,	"	6,000.00	" 1,	1933
95 "	102,	"	8,000.00	" 1,	1934
109 "	116,	"	8,000.00	" 1,	1935
124 "	132,	"	9,000.00	" 1,	1936
140 "	148,	"	9,000.00	" 1,	1937
157 "	166,	"	10,000.00	" 1,	1938
175 "	184,	"	10,000.00	" 1,	1939
194 "	204,	"	11,000.00	" 1,	1940
214 "	220,	"	7,000.00	" 1,	1941
223 "	225,	"	3,000.00	" 1,	1941

For the difference between the sum of $125,000.00 in bonds and the $124,209.80, to which the said Otis & Company are entitled, they will surrender coupons attached to said bonds to the amount of $790.00, and credit $1.80 on one of the coupons retained by them. [fol. 26] It is further considered, ordered and decreed that the Receiver heretofore appointed in this cause will proceed to collect the taxes heretofore levied upon the real property within said district, but in view of the fact that only $125,000.00 of said bonds will be outstanding, the rate of taxation fixed at the time of the issue of said

bonds will be reduced to two per cent upon the assessment of benefits in each of the years 1922 to 1924, inclusive, and 3.2 per cent of the amount of the assessed benefits for each of the years 1925 to 1941, inclusive, and said Receiver will remit to the Chase National Bank of the City of New York, at its office in the City of New York, N. Y., on or before the first day of March and September of each year, the amount necessary to pay the bonds and coupons not surrendered, as they mature, adding to each remittance the sum of 12½ cents for each $100.00 par value of bonds, and the sum of 25 cents for each $100.00 par value of coupons, the same being the agreed compensation to the said Bank for paying, cancelling and returning the said bonds and coupons.

It is further considered, ordered and decreed that the defendant district pay all the costs of this suit, and that the amount of compensation to be allowed to the plaintiff and its solicitors be reserved for further proceedings. The Receiver will, from time to time, make report to this Court of his doings for its approval.

It is further considered and ordered that the Receiver herein be allowed on account of his services to date the sum of Fifteen Hundred Dollars, and that a like amount be allowed to his counsel, payable out of the funds in the Receiver's hands.

(Signed) Jacob Trieber, Judge.

Bond on Appeal for $500—Approved and filed June 28, 1923; omitted in printing

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[fol. 27] In United States District Court

Assignment of Errors—Filed June 28, 1923

Now comes the defendant and intervening property owners authorized to defend in its name by J. F. Gautney and Henry D. Ashley, their solicitors, in the above numbered and entitled cause, and in connection with their petition for an appeal herein, assign the following errors which plaintiff in error aver occurred in the trial thereof and upon which they rely to reverse the decree entered herein as appears of record.

1. Because the said United States District Court, Eastern District of Arkansas, Western Division, erred in not declaring the pretended assessment of benefits of Road Improvement District No. 7 of Poinsett County, Arkansas, filed in the office of the County Clerk of said [fol. 28] County on December 15, 1919, and approved and confirmed by Act No. 45 of the extraordinary session of the General Assembly of Arkansas, approved February 4, 1920, unconstitutional and void for the reason that the said pretended assessment of benefits included therein the lands in the floodway of Drainage District No. 7 of Poin-

sett County, Arkansas, which lands embraced in said floodway aggregated approximately 3,000 acres, and that the benefits assessed against the same aggregated $70,000.00, and said lands so embraced in said floodway and assessed for benefits in said Road Improvement District No. 7 were not subject to assessments of benefits therein.

2. Because said court erred in not holding that the lands included in the floodway of Drainage District No. 7 approximating 3,000 acres and upon which aggregate benefits in a sum approximating $70,000.00 had been assessed in favor of Road Improvement District No. 7, to be unconstitutional and void because the area embraced in the floodway of Drainage District No. 7 was by the order of the county court of Poinsett County, Arkansas, duly made at the July 1919 term thereof, taken and appropriated by Drainage District No. 7 for use in the construction of said floodway, and because said assessment of benefits in Road Improvement District No. 7 was not filed in the office of the Clerk of the County Court of Poinsett County, Arkansas, until December 15, 1919, and that by reason thereof Road Improvement District No. 7 of Poinsett County, Arkansas, has no right or authority under the Constitution and laws of Arkansas to assess for benefits in said Road Improvement District, lands previously taken and condemned for the construction of the improvement in Drainage District No. 7 aforesaid.

3. Because the court erred in not holding said pretended assessment of benefits filed in the County Court of Poinsett Country, Arkansas, December 15, 1919, and attempted to be confirmed by the Act of the extraordinary session of the General Assembly of Arkansas for the year 1920, approved February 4, 1920, to be unconstitutional and void, for that prior to the filing of said assessment of benefits in the office of the county clerk and the approval thereof by said Act No. 45, as aforesaid, Drainage District No. 7 of Poinsett County, Arkansas, by order of the county court of said county duly made and entered at the July 1919 term thereof, had taken and appropriated approximately 3,000 acres of land for use as a floodway for constructing the improvements therein, which strip of land was about one half mile in width and extended diagonally across the area included [fol. 29] in Road Improvement District No. 7, thereby destroying the integrity of said District and rendering said Act No. 45 approved February 4, 1920, unconstitutional and void, because of the demonstrable error therein attempting to tax for benefits lands erroneously embraced in said Road Improvement District No. 7 which had been taken and condemned for use in constructing the improvements in Drainage District No. 7 prior to the time of the filing of the assessment of benefits in Road Improvement District No. 7 and the approval thereof by said Act No. 45 as aforesaid.

4. Because said court erred in not holding that the cost of the construction of the proposed improvement in Road Improvement District No. 7 exceeded the assessment of benefits therein and that by reason thereof said assessment of benefits was unconstitutional and void.

5. Because said court erred in holding the assessment of benefits made and filed in the office of the county clerk of Poinsett County, Arkansas, December 15, 1919, and attempted to be approved and confirmed by Act No. 45 of the extraordinary session of the General Assembly of the State of Arkansas, approved February 4, 1920, to be a valid assessment of benefits under the Constitution and laws of the State of Arkansas.

6. Because said court erred in holding that the bonds pretended to be issued by Road Improvement District No. 7 of Poinsett County, Arkansas, dated April 1, 1919, and aggregating the sum of $230,000.00 to be valid and subsisting obligations against said District, when at the time of the issuance thereof no assessment of benefits for the payment of the cost of the construction of the improvement in said district had been assessed against the real property in said district in manner and form prescribed by law.

7. Because said court erred in holding that Otis & Company, the pretended owners of said bonds, had purchased the same for value and without notice, for it appears that said bonds were issued April 1, 1919, before any assessment of benefits had been made and filed in said district.

8. Because said court erred in declaring that said bonds were lawfully issued and purchased by Otis & Company for a valuable consideration and without notice. That there had been no assessment of benefits against the real property in said district for the purpose of paying said bonds and interest thereon at the date said bonds were issued.

[fol. 30] 9. Because said court erred in holding that the decree of the Chancery Court of Poinsett County, Arkansas, made and entered on the 6th day of July, 1922, wherein the land owners in Road Improvement District No. 7 of Poinsett County, Arkansas, were plaintiffs, and Road Improvement District No. 7, its commissioners, et al., were defendants, adjudged and decreed that the assessment of benefits made and filed in the County Court of Poinsett County, Arkansas, on December 15, 1919, and purporting to have been confirmed and approved by Act No. 45 of the extraordinary session of the General Assembly of the State of Arkansas, approved February 4, 1920, was unconstitutional and void and was therefore annulled and set aside was not res adjudicata as to Otis & Company, and the plaintiff herein, it appearing that said decree was rendered by a court of competent jurisdiction, and that no appeal had been prosecuted therefrom from said court to the Supreme Court of Arkansas, and that more than six months had elapsed between the date of the rendition of the decree and the entry of same of record, and the time this cause came on for trial in the United States District Court herein.

10. Because said court erred in refusing to hold that said assessment of benefits aforesaid was unconstitutional and void and in violation of Section 8, Article 2 of the Constitution of the State of

Arkansas, and in violation of the 14th Amendment to the Constitution of the United States.

11. Because said court erred in allowing plaintiff to recover herein the sum of $17,250.00 paid to James Gould as alleged profit from the sale of the bonds of said Road Improvement District No. 7, it no where appearing in the evidence that the plaintiff herein or Otis & Company had any right or authority from Road Improvement District No. 7 or its officers to pay said sum of money to said James Gould and charge it to the account of said Road Improvement District.

12. Because the Court erred in taking and exercising jurisdiction in this case for the reason that the Chancery Court of Poinsett County, Arkansas, first acquired jurisdiction of the same matter involved in this suit and both this suit and said suit in equity, Weona Land Company vs. Road Improvement District No. 7 of Poinsett County, Arkansas, involving the very matters in controversy in this case, having been filed before this suit was brought and both this suit and that being proceedings in rem or at the least, quasi in rem, this Court has no jurisdiction under the law as laid down by the Supreme [fol. 31] Court of the United States in case of Kline vs. Burke Construction Company decided November 20th, 1922.

13. The court erred in holding Otis & Company, not a party to this suit, to be innocent purchasers of $131,000.00 of the so-called bonds pretended to be issued by this District for the following reasons:

A. Said District Warrants are not negotiable instruments of such a character as to be entitled to the rights of innocent purchasers for value because said so-called bonds are no more than special assessment warrants, payable only out of assessments made against lands within the limits of said alleged road District No. 7.

C. Because the final decree heretofore rendered by the Chancery Court of Poinsett County, Arkansas, binds all persons, firms and corporations directly or indirectly connected with said district or having any contractual relations with said district.

D. Because said Otis & Company although not actual parties to said suit in the Chancery Court of Poinsett County, Arkansas, had actual knowledge of the pendency of said suit long before the final decree therein was rendered, and were proper parties to said suit and could have become parties at any time by entering their appearance.

E. Because before the rendition of the decree by this Court from which this appeal is taken was rendered, a special Act of the Legislature of Arkansas had been passed by which said District was dissolved of which act the District Court is by law required to take judicial notice and there are now no commissioners or other [authorized] representatives of said District who can by this or any other Court be mandamused to levy a tax with which to pay said alleged bonds.

14. Because the court was without jurisdiction to hear and determine this cause for the reason that by Section 20, Act No. 322, of the General Assembly of the State of Arkansas for the year 1919, approved March 21, 1919, it is provided that if any bond or interest coupon on any bond is not paid within thirty days after its maturity it shall be the duty of the chancery court of Poinsett County, on application of any holder of any bond or interest coupon so overdue, to appoint a receiver to collect taxes and an assessor to reassess [fol. 32] benefits if necessary. That said Act is a part of the contract in this cause and prescribed the Court in which such suit or action shall be brought.

(Signed) Henry D. Ashley, Gautney & Dudley, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Statement of Evidence)

C. P. ROCKWOOD testified:

That he was connected with the firm of Otis & Company bond dealers, Cleveland, Ohio, and had been for a period of ten years; that said company purchased the $230,000.00 bonds of Road Improvement District No. 7, Poinsett County, Arkansas, bearing date April 1, 1919, from James and Roy Gould, bond dealers. At the time of the purchase Otis & Company had no knowledge of any defect in the assessment of benefits upon which the bonds were issued, nor any defect in the bonds or in the power of the district issuing them.

On July 28, 1919, James Gould agreed to sell Otis & Company these bonds at $1.03½.

Ex. 1

Investment Securities. Citizens Bank Building

Office of Jas. Gould

Roads—Drainage—Municipal Bonds—County Warrants

Pine Bluff, Ark., July 28, 1919.

Mr. A. J. Twerrell, % Otis & Co., Cleveland, Ohio.

M- DEAR MR. TWERRELL:

In re Poinsett County Road Bonds

This will confirm the sale to you of three issues of Poinsett County, Arkansas road bonds at $1.03½ and accrude interest, basis

6% bonds, subject to convertible clause of 5% or 5½% bonds at your option. I have not yet been able to agree upon the amount of deposit definitely that will be demanded by the Board but in no event [fol. 33] will it be over 50% and I am insisting upon it being as low as 25%. It is understood that the money that is left with you you should pay interest at the rate of 3% per annum, computed upon daily balances. If this is according with your understanding and satisfactory with you, please advise me at your earliest convenience.

(Signed) Jas. Gould. JG. L.

Gould was unable to make delivery and Otis & Company notified them that they were no longer bound by their contract of purchase. This was agreed to by Gould. Gould represented that he had put up a certified check for a substantial sum to make good a bid for the bonds, and that unless he could sell them he would sustain a heavy loss. Negotiations for the sale of the bonds continued and finally on the 15th day of June 1920, James Gould came to Otis & Company and offered to sell them the bonds at par. This offer was accepted and the transaction is represented by the memorandum made at the time, which is as follows:

Otis & Company in Account with James & R. W. Gould

Re Road Improvement District No. 7, Poinsett County, Arkansas

$230,000 Bonds at Par		$230,000
Less Cash	$17,250.00	17,250.00
" Certificate of Deposit	$212,750.00	
	$230,000.00	
Certificate of Deposit		$212,750.00

The bonds were in possession of the Guardian Savings & Trust Company; that company held the certificate of the clerk of Poinsett County showing that there was no litigation against the district.

Gould brought with him an order directed to Guardian Savings & Trust Company, which is as follows:

[fol. 34] Ex. 5

Harrisburg, Arkansas, May 19, 1920.

Guardian Savings & Trust Company, Cleveland, Ohio.

GENTLEMEN: This will be your authority to turn over to Otis & Company of your City, $230,000.00 of bonds of Road Improvement District Number 7, Poinsett County, Arkansas, after you have certified same as Trustee for the issue.

Road Improvement District No. 7, Poinsett County, Ark., by B. F. Rogers, Secretary & Treasurer. H. B. Thorn, President. C. A. Blanton, Member of Board.

Delivered 6/15/20.

Gould also brought the opinion of Messrs. Rose, Hemingway, Cantrell & Loughborough approving the bonds.

The bonds being in the possession of the Guardian Savings & Trust Company we gave it our check for $17,250.00 which we understand was by it paid over to James Gould as a profit on the sale of the bonds. We made a charge of this item on our books against James Gould. On september 16, 1920, we opened an account in the name of the district for the balance of the bond issue. On March 17, 1921, we stopped paying out money on account of the district. Otis & Company have retained all of said bonds except $15,000.00 sold to investors. So far as the witness knows, none of the purchasers of bonds from Otis & Company had any notice of any defense of the district. All of the bonds were sold to Otis & Company and by them sold before maturity and in the ordinary course of business. Interest represented by semi-annual coupons due March 1, 1922, $6,900.00 not paid by defendant. Interest due on March 1, 1921, and September 1, 1921, was paid.

On cross-examination the witness stated that Otis & Co., in purchasing relied on the recitals in the bonds and on the opinion of counsel that they were valid, That he knew nothing of the litigation; that [fol. 35] Otis & Company paid the following items on the orders of Road Improvement District No. 7:

Pride & Fairley, September 3, 1920	$6,900.00
First National Bank of Marked Tree, September 3, 1920	4,600.00
Farmers & Merchants Bank of Marked Tree, October 6, 1920	5,000.00
First National Bank of Marked Tree:	
October 6, 1920	10,000.00
October 27, 1920	2,000.00
Maddox & Finn, November 5, 1920	3,360.00
Pride & Fairley, November 6, 1920	2,000.00
First National Bank of Marked Tree:	
November 9, 1920	25,000.00
December 13, 1920	20,000.00
First National Bank of Marked Tree, December 29, 1920	15,000.00
Chase National Bank of New York, February 27, 1922	6,917.25

The contract under which the bonds were finally purchased from Gould was an oral one. No discount was charged. The bonds sold at par. Past due coupons had been cut off when Otis & Co., bought the bonds. George W. York is and was a member of the firm of Otis & Company on July 6, 1921, and had been a member of the firm for ten years prior thereto.

Witness was recalled and testified, that in preparing exhibits in connection with former depositions, Draft No. 5 dated October 22, 1920, for $2,000.00 was accidentally omitted.

Referring to the schedule made by Otis & Company as set forth in the statement filed as Exhibit No. 8, items of September 27, 1920 and March 1921, $6,917.25 each, represented interest.

A. H. LANDERS testified:

Was county clerk of Poinsett County in 1919; ceased to be such clerk about the middle of July 1920. The small red book shown witness is the assessment of benefits in said district and was filed [fol. 36] in the office of the county clerk December 16, 1919.

B. F. ROGERS, one of the Commissioners of the Road District, testified:

We sold the bonds to Otis & Company through James Gould for 98¢ on the dollar, but delayed delivering the bonds until the Amendatory Act was past. Delivered them on May 28, 1920. I do not know that Judge Gould got any commission.

H. B. THORN, one of the Commissioners of the Road District, testified:

The bonds were handled by Judge Gould at Pine Bluff; the district paid him no commission and paid no commission to anyone; the bonds were sold at 98¢.

T. G. STATION testified:

That he had lived in Poinsett County 27 years. Frequently over the territory embraced in the district; the route of the proposed road is very low. Water stands on the land sometime not less than four or more than six months in the year, and gets as deep as four to six feet over a greater part of the route of the road. Nobody living along the route of the road except at the extreme south end. Not more than 2,000 acres in cultivation in the district. In high water logs are floated all along the line of the proposed road; land worth $25.00 an acre. Floodway of Drainage District No. 7, Poinsett County, Arkansas, one half mile wide; extends diagonally through district from northeast to southwest.

E. W. TSCHUDY, testified:

Is thoroughly familiar with the territory embraced in Road District No. 7; that the St. Francis River would wash away the proposed road; impractical to build a road in Road District No. 7 at a reasonable cost; $230,000.00 would not pay for it.

To the same effect is the evidence of W. E. Pittman, H. Coldren, W. B. Chapman, C. C. Cummings, R. Nicewander, Geo. W. Smith, J. G. Haverstick, W. P. Cooper, George Hirschman, W. B. Bradshaw, M. L. Turnbow, W. H. Alcorn, A. Basier, and W. E. Pittman

[fol. 37] all of whom are land owners and familiar with the district, and all of whom state that the road is impractical, and will not be of any value to the land owners in the District.

WILLIS AYRES, an engineer, testified:

That he was acquainted with the territory embraced in Road District No. 7. That he estimated the road could be built for $294,335.00 for working labor, to which should be added $29,435.50 for miscellaneous expenses making a total of $323,768.50.

W. O. MCMILLAN, civil engineer, testified:

That he went over the territory embraced in the District in 1922 following the line of the proposed road. In his opinion the total cost of the road would be $330,954.48.

JOE P. PRIDE testified:

That in his opinion the bridges could be built for $46,546.00; that the total cost would be $346,645.80.

R. C. FERGUS, engineer, testified:

That the road could be built for $346,645.80.

W. A. LUNSFORD testified:

That he had lived all his life in the St. Francis Valley; was thoroughly familiar with the route of the road; that the St. Francis River overflowed this road from three to four feet; water standing from 1st of January to 15th of June. Beginning at the north end of the road first mile was through flat, low country; in the next mile are Fortune Slough and Honey Cypress, 4½ feet deep; first three miles of the route absolutely swamp land; then we come to 1,000 or 1,200 feet of cane ridge; then through a deep slough approximately 500 feet wide; various ponds, Flag and Willow, openings and sloughs are found throughout the route. I do not think that over one third of the territory in the district could be cultivated without drainage; there are now 2,000 acres in cultivation in the district.

[fol. 38] N. H. SAYFORD, Civil Engineer, testified:

That he is vice president of the Morgan Engineering Company, a graduate of Lehigh University, and has had 19 years of practical experience as a civil engineer; has been in charge of several drain-

age districts in the State of Arkansas and the St. Francis Valley, and is familiar with the territory in Road Improvement District No. 7; went over the route of the road; examined the plans and specifications filed the 16th day of December, 1919. Plans call for road of gravel surface 16 feet wide, 6 inches thick, steel bridges where needed, designed for 15 ton trucks and 16 feet wide on the roadway. The original plans provide for a dump six inches to a foot above the ground. Such a road would not be practicable because in building gravel roads it is necessary to elevate the subgrade, that is the earth immediately below the metal, so it will run no risk whatever of becoming wet. If it does the metal fails by reason of the softening of the earth beneath. The top of the dump must be some distance above flood water so that it will not become saturated. To make a proper dump through this region it would have to be from four to five feet in height. The contract contemplates 155,000 yards of earth excavation. If the floodway is to be bridged on the line of the original road, the bridge will be 6,356 feet in length crossing the floodway diagonally. If the floodway is crossed at right angles, the length of the bridge will be about 2,500 feet. The road without the bridge across the floodway will cost approximately $300,000.00. The grading costs 62½¢ per cubic yard according to contract; with steel bridges according to the original plans, the total cost will be $747,500.00. Wooden bridges, $461,100.00. If steel bridges are constructed at right angles across the floodway, total cost will be $535,600.00; wooden bridges $450,000.00.

JOHN E. BUXTON, testified:

That he is familiar with the route of the road; is engineer and surveyor; has been over the ground; that seventy-five per cent of the ground in the district overflows to a depth of five to six feet.

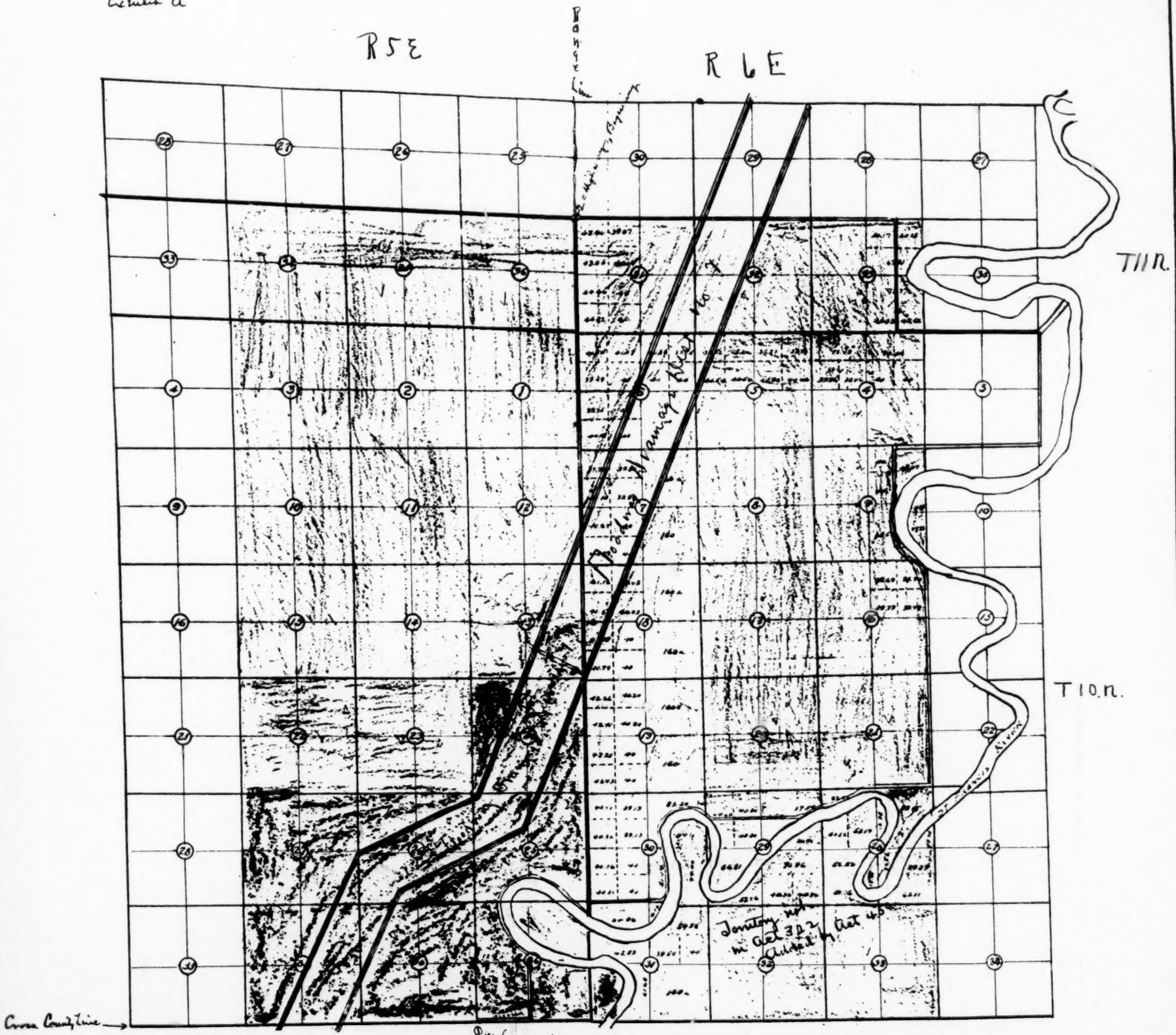
[fols. 39 & 40] The Report of the Board of Directors of Drainage District No. 7 of Poinsett County, Arkansas, to the County Court of Poinsett County showing the change of plans, was filed May 14, 1919, said report showing the plan of the proposed floodway which is shown on the map hereto attached, marked Exhibit "A" to this record.

Which Exhibit "A" is as follows:

(Here follows Exhibit A, marked side folio pages 41 and 42.)

[Map endorsed on back:] Exhibit A—Map showing property included in Road Improvement District No. 7 of Poinsett County, Arkansas.

Exhibit "A"



MAP
SHOWING PROPERTY INCLUDED
IN
ROAD IMPROVEMENT DIST NO 7
POINSETT CO. ARK.

All of territory embraced in Road Dist. No 7 is in Drainage Dist. No 7, formed prior to Road District No. 7, embracing in its boundaries (Drainage Dist. No 7) approximately 165,000 acres of land.

Cross County

R 5 E

Highway, end

D-D Highway created by Act 322

MAP

SHOWING PROPERTY INCLUDED IN ROAD IMPROVEMENT DIST NO 7 POINSETT CO. ARK.

Aug 13 1921

All of territory embraced in Road Dist # 7 is in Drainage Dist No 7, formed prior to Road District No. 7, embracing in its boundaries (comprising Dist No 7) approximately 165,000 acres of land. Road Dist 7 territory embraces approximately 26,880 acres, included in said territory is approximately 3000 acres condemned and used by D.D. 7 as a floodway

Territory in Red is found described in Amendatory Act No. 45, Extra Ordinary Session 1920, approved Feby. 4, 1920.

Description of highway shown known as contained in Act 322 as amended by Act 45: Beginning at NE Corner Sec. 36 T. 11 N R 5 E thence South on Range Line between Ranges 5 & 6 to bank of St Francis River, thence along bank of River in a meandering to Center Sec. 26 T 10 N R 5 E, thence south to southern line of said section, thence west on Township line & line between secs. 35 & 36 T 10 N R 5 E.

[fol. 43] This floodway embraces approximately 3,000 acres of land, is one-half mile wide and runs diagonally through the district from northeast to southwest as shown on the map. That the County Court of Poinsett County, Arkansas, at its July Term, 1919, made an order approving the report of the Commissioners of Drainage District No. 7 hereinbefore referred to, and condemned for use as a right of way the territory shown on the map marked Exhibit "A" for use as a floodway in said district, consisting of a strip of land one half mile in width, embracing approximately 3,000 acres and running diagonally through the district. The decree of the chancery court of Poinsett County, Arkansas, made Exhibit "B" to the complaint, and read in evidence, was rendered July 6, 1922, the same being an adjourned day of the regular May Term, 1922 of the Poinsett Chancery Court of Poinsett County, Arkansas.

Exhibit "A" to the complaint herein was also read in evidence.

Exhibits in Evidence

There was also read in evidence the following affidavit of G. W. York, dated July 6, 1921, which is as follows:

Affidavit

State of Ohio,
County of Cuyahoga, ss:

George W. York, being first duly sworn, states that he is a member of the firm of Otis & Company a co-partnership having its office and principal place of business in the City of Cleveland, State of Ohio; that on the 9th day of September, 1920, the firm of Otis & Company purchased the bonds issued by Road Improvement District No. Seven of Poinsett County, Arkansas, said bonds so purchased aggregating $230,000.00, being dated April 1st, 1919, and bearing interest at the rate of Six percent (6%) per annum, payable semi-annually; that the following payments have been made by said firm to the commissioners of said Road Improvement District, to wit:

Sept. 9, 1920	$6,900.00
Sept. 13, 1920	4,600.00
Sept. 27, 1920	6,917.25 Int.
Oct. 9, 1920	5,000.00
Oct. 11, 1920	10,000.00
Oct. 27, 1920	2,000.00
[fol. 44] Nov. 10, 1920	3,360
Nov. 12, 1920	2,000
Nov. 12, 1920	25,000
Dec. 13, 1920	20,000
Jan. 3, 1921	15,000
Mar. 2, 1921	5,764.38
Mar. 12, 1921	1,152.87 Int.,

aggregating the sum of $104,334.50; that said payments were made to B. F. Rogers, C. A. Blanton and H. B. Thorn as commissioners of said Road Improvement District; that the last payment made by said Otis & Company to said Commissioners on said bond sale is dated March 12, 1921; that no part of said money has been returned or paid over by said District or anyone representing it to Otis & Company or to any person representing said firm; that the semi-annual interest on said bonds has been paid as follows:

Sept. 1, 1920	$6,900
March 1, 1921	6,900

that affiant is familiar with the books of Otis & Co. and says that the statements made in this affidavit are true.

(Signed) George W. York.

Subscribed and sworn to before me this 6 day of July, 1921.
C. P. Rockford, Notary Public. (Seal.)

That the following letters may be read in evidence on the trial of said cause:

Cleveland, February 15, 1921.

Mr. William B. Chapman,
c/o Chapman-Dewey Lumber Co.,
Kansas City, Mo.

My Dear Sir: Immediately after you left the office on February 5th we took up the matter of Road Improvement District #7 of Poinsett County, Arkansas, to ascertain just how we stood in this matter, also with a view of working with you people to a mutually satisfactory settlement. We now learn that the injunction has been dissolved.

We are quite anxious about this District as we always feel that any district in Arkansas should have the moral support of the tax payers [fol. 45] behind it. As your company is one of the largest tax payers in this district and you are against this project going through, we are entirely willing to work with you if possible to have the Act repealed, providing of course proper settlement can be made for the return of the bonds. We have sold some of these securities, but feel sure that we can immediately get them in our possession again if necessary, as we have like securities that we can trade with our customers.

We would appreciate very much any suggestions you may make. At our instance, Judge Rose of Little Rock is preparing an Act for the present Legislature to pass abrogating this road district, and we believe if the tax payers will get behind this strong enough, the district can be entirely eliminated. This is going to need a lot of work from you people who have to pay the taxes. We cannot exert

ourselves to any great extent in this, but are willing to work with you if it is possible to do so. We understand from our representative that the officials of this district together with your representative from your county are against repealing the Act and it will consequently require a considerable influence if this district is to be eliminated.

We would be very glad to hear from you with any suggestions.

Yours very truly, Otis & Co., by A. J. Twerell, Mgr. Municipal Dept. A. J. Twerell-M.

February 17, 1921.

Otis & Co., Cleveland, Ohio.

Attention of A. J. Twerell

GENTLEMEN: We have at hand your letter of February 15th with reference to the matter of Road District No. 7 of Poinsett County, Arkansas for which we thank you. We believe that you have been misinformed as to the injunction against this district. Our attorney, Judge J. F. Gautney of Jonesboro, Ark. advises us as follows under date of January 29, 1921:

"Chancellor Wheatley refused to dissolve the injunction but modified it so as to permit the payment of the taxes levied by the district, but such taxes as were paid are to be held by the sheriff and collector [fol. 46] and not paid over to the treasurer of the district until the suit is finally disposed of."

This was also the understanding of the writer who was present at the trial and heard the Judge render his decision. However, as you know, we do not feel that a law suit is the best way to dispose of these road matters, and we are willing to co-operate with you in obtaining the passage of an act abrogating this road district. A meeting of the tax payers of this district was recently held in Marked Tree, Arkansas, at which 90% of the land in the district was represented, and it was agreed that every effort should be made to have the original act repealed. As a matter of fact there is absolutely united opposition on the part of the tax payers against this road, and our attorney advises us that there is no doubt but that it can be eliminated in court, if not by the legislature. We note that at your request Judge Rose of Little Rock is preparing an act for the present legislature to pass, abrogating this road district, and our attorneys, Ashley & Gilbert, have written him today for a copy of this act.

Our company, together with the Northern Ohio Cooperage & Lumber Co., the Weona Land Co., and the other large land owners in the district, have formed an organization, of which Mr. E. W. Tschudy of the Weona Land Co. is Treasurer, for the purpose of obtaining the elimination of this district, and you can be assured

that when the proper bill is brought up in the legislature that it will receive our united support.

As you know it is our firm opinion that Road No. 7 cannot be built as planned for the estimated cost, and that the construction of such a road prior to the completion of the drainage would be simply a waste of thousands of dollars, resulting ultimately in the confiscation of the land which is already burdened by the taxes for the drainage district and for another road district.

Yours truly, Chapman & Dewey Lumber Co., by —— ——.
WBC/AH.

[fol. 47] Cleveland, February 21st, 1921.

Wm. Burr Chapman, Vice President Chapman & Dewey Lumber Co., 500 Rialto Building, Kansas City, Mo.

DEAR SIR: We have yours of the 17th and not- what you have to say relative to Road District #7 of Poinsett County, Arkansas. You can readily see that we have to be very careful in taking a position on these bonds at the present time. We are given to understand that the representatives from that district together with the present directors are very much against the cancellation of the district. We have bought the bonds, have sold a few of them, and are not very much interested in the cancellation of the district excepting that we do not want to be handling the bonds of any district where there is friction between the tax-payers and the officials and where the district is not wanted by the taxpayers. The strength of the opposition of this district must come, as we see it, from the taxpayers and not from us.

We are willing to work with you to a satisfactory adjustment of this matter, if possible, but suggest that your tax payers keep us closely advised and we believe that if we work together, we can come to a just conclusion regarding this district that will be satisfactory both to your tax payers and to us.

We have asked our Arkansas representative to see that Judge Rose works with your Attorneys, although of course you understand that we must be protected in our interests.

Yours very truly,
Otis & Co., by A. J. Twerell, Mgr. Municipal Dept. A. J. Twerell.—M.

Memphis, Tenn., October Third, Nineteen Twenty-two.

Judge J. F. Gautney, Jonesboro, Arkansas.

DEAR JUDGE: I find on my return to Memphis your letter of September 21st requesting certain details regarding our correspondence [fol. 48] with Otis & Company relative to Road District #7, Poinsett County, Arkansas. In compliance with same we enclose herewith our correspondence with Otis & Company which we have marked File "A" and File "B" respectively. File "A" contains the correspondence beginning February 15th, 1921, and ending April 18th,

1921, and has reference to the efforts which were being made at that time both by Otis & Company and by ourselves to have Road District #7 annulled and its obligations paid off or cancelled on some compromise arrangement whereby Otis & Company would stand a fair proportion of the loss and the land owners would bear their just proportion of the same. As you will probably recall this effort culminated in a meeting held in Judge Allen Hughes' office, Memphis, in either May or June, 1921, at which time it was found impossible to induce the Commissioners to consent to the abandonment of the project.

On February 5th, 1921, the writer called on Otis & Company in Cleveland, Ohio, and personally notified them of the legal action which was pending in the Chancery Court Poinsett County at that time against the Commissioners of Road District #7, and I stated very plainly and in considerable detail the grounds of opposition to the project on the part of the land owners. Not only did I go into our ground for complaint very fully at this time but I also elaborated on same in subsequent letters, copies of which are attached herewith. I specifically warned them that in our opinion, and in the opinion of our attorneys, the Bonds were not legal obligations of the District and that the Tax Payers and the District, of which I represented over 90% were contesting the validity of the Bonds and would refuse to pay Taxes, which in our opinion were unlawfully levied to pay interest or principal on same. This information seemed to impress both Mr. Twerell, who was the Manager of their Municipal Bond Department and Mr. York, who was one of the partners of Otis & Company at that time, to such an extent that in their letter of February 15th, attached herewith in my file, Mr. Twerell stated as follows:

"We have sold some of these securities but feel sure that we can immediately get them in our possession again if necessary, as we have like securities that we can trade with our customers."

It was our effort at this time to have the act creating the district repealed with the intention of obtaining some compromise agreement [fol. 49] with Otis & Company whereby the land owners and Otis & Company would bear jointly the preliminary expenses of the District. However, it developed very shortly that Otis & Company had done a very unusual and extraordinary thing in that they advanced a very large sum of money to the Commissioners before any of the work on the Road had been done. It was impossible for us to obtain the exact amount of these advances at that time but from various sources it was estimated between $100,000 and $140,000. This fact was brought out at our final meeting with Otis & Company in Judge Hughes' office at which time the Commissioners refused to consent to the abandonment of the road and at which time all plans for a compromise were definitely abandoned by the land owners.

We feel that the enclosed correspondence is very complete and will give you in detail information regarding the efforts of the land owners of the District who oppose the collection of Taxes, et cetera. We

want to call your particular attention to Otis & Company letter of March 7th in file addressed to our company, in which Mr. Twerell states as follows:

"However if a proper settlement could be made so that these bonds were withdrawn we feel we could readily get back from our clients all the bonds that we placed in their hands."

If there is any additional information the writer can supply do not hesitate to call on me.

Yours very truly, Chapman & Dewey Land Company, by W. B. Chapman. WBC-B.

cc. H. D. Ashley, #500 Rialto Bldg., Kansas City, Mo.

It was admitted that the plaintiff is a corporation under the laws of the State of Ohio.

It was testified by a number of witnesses that all the land in Road Improvement District No. 7 of that county and is in within the limits of Drainage District No. 7 of that county and is in course of reclamation.

It is admitted that no funds were supplied for paying the coupons due March 1, 1922, and September 1, 1922.

[fol. 50] It is admitted that the pledge and mortgage exhibited with the complaint was executed, acknowledged and filed for record in the office of the recorder of deeds of Poinsett County in apt time.

A correct statement of the evidence agreed to by counsel for both parties.

(Signed) Jacob Trieber, Judge.

Endorsed: Filed June 28th, 1923. Sid. B. Redding, Clerk.

In United States District Court

Clerk's Certificate—Filed Aug. 8, 1923

I, Sid B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the original remaining of record in my office, at Little Rock, Arkansas, of the statement of evidence, assignment of errors, record and all proceedings as per the stipulation of counsel, in the case of The Guardian Savings & Trust Company, Plaintiff, vs. Road Improvement District No. 7 of Poinsett County, Arkansas, Defendant.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 27th day of July in the year of our Lord, One Thou-

sand Nine Hundred and Twenty-three and of the Independence of the United States of America, the One Hundred and Forty-eighth.

Sid B. Redding, Clerk. (Seal U. S. Dist. Court, East. Dist. Ark., Western Div., U. S. A.)

[File endorsement omitted.]

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 6422

ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS, Appellant,

vs.

THE GUARDIAN SAVINGS AND TRUST COMPANY, as Trustee.

APPEARANCES OF COUNSEL—Filed Aug. 11, 1923

The Clerk will enter my appearance as Counsel for the Appellant.

J. F. Gautney, for Appellant, Jonesboro, Ark.

[File endorsement omitted.]

(Appearance of Mr. Henry D. Ashley as Counsel for Appellant)

The Clerk will enter my appearance as Counsel for the Appellant.

Henry D. Ashley.

[File endorsement omitted.]

[fol. 52] (Appearance of Counsel for Appellee)

The Clerk will enter my appearance as Counsel for the Appellee.

G. B. Rose, D. H. Cantrell, J. F. Loughborough, A. W. Dobyns.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION RE CERTIFICATE OF J. BRINKERHOFF—Filed Jan. 16, 1924

It is hereby Stipulated that certificate of J. Brinkerhoff, Abstractor of Harrisburg, Arkansas, may be filed and taken as part of the record in this case, and as proof of the particular lands, in Road District No. 7 Poinsett County, Arkansas, owned by W. E. Pittman, W. H. Alcorn, Adam Basier, W. D. Cooper, R. W. Denton, C. C. Cummins, C. E. Causey.

G. B. Rose, for Appellee. J. F. Gautney, Henry D. Ashley, for Appellant.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS

EXHIBIT IN EVIDENCE

(Certificate of J. Brinkerhoff as to Ownership of Lands Embraced in Road Improvement District No. 7 of Poinsett County, Arkansas)

List of lands embraced in Road District Number Seven (7) of Poinsett County, Arkansas, with name of record title owner set opposite each tract, as follows:

Part of section	Section	Town	Range	Record owner
All	1	10	5	Weona Land Company
All	2	10	5	Weona Land Company.
All	3	10	5	Weona Land Company.
All	10	10	5	Weona Land Company.
All	11	10	5	Weona Land Company.
All	12	10	5	Northern Ohio Cooperage & Lumber Company.
N. ½ and S. W. ¼	13	10	5	Morgan & West Box Co.; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
S. E. ¼	13	10	5	E. A. Rolfe.
[fol. 54] All	14	10	5	Morgan & West Box Co.; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
All	15	10	5	Weona Land Company.
All	22	10	5	Morgan & West Box Co.; also deed to Board of Directors Drainage District No. 7—taxes of 1922.

All	23	10	5	Morgan & West Box Co.; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
N. ½ N. E. ¼	24	10	5	Van Sherfield; also deed to Board of Directors Drainage District No. 7—taxes of 1921 & 1922.
S. ½ N. E. ¼	24	10	5	T. J. Bennett.
N. W. ¼	24	10	5	J. B. Peyton, S. H. Mann & C. W. Norton.
S. E. ¼	24	10	5	T. J. Bennett.
[fol. 55] S. W. ¼	24	10	5	E. A. Rolfe; also deed to Board of Directors Drainage District No. 7—taxes 1921 & 1922.
N. ½ N. ½	25	10	5	W. P. Gorman; also deed to Board of Directors Drainage District No. 7—taxes of 1921.
S. ½ N. ½	25	10	5	O. N. Warren.
S. E. ¼	25	10	5	O. N. Warren.
S. W. ¼	25	10	5	J. A. Bradsher; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
N. E. ¼	26	10	5	V. T. Utley & G. Carey; also deed to Board of Directors Drainage District No. 7—taxes of 1920-1921-1922.
N. W. ¼	26	10	5	J. B. Peyton, S. H. Mann & C. W. Norton.
E. ½ S. E. ¼	26	10	5	E. W. Farnell & J. J. Warren; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
[fol. 56] W. ½ S. E. ¼ & S. W. ¼	26	10	5	C. C. Warren.
All	27	10	5	Poinsett Lumber & Mfg. Co.
E. ½ N. E. ¼	34	10	5	C. A. Worthy; also deed to Board of Directors Drainage District No. 7—taxes of 1921.

List of Lands Embraced in Road District Number Seven—Cont'd

Part of section	Section	Town	Range	Record owner
W. ½ N. E. ¼	34	10	5	Andy Jones; also deed to Board of Directors Drainage District No. 7—taxes of 1921 & 1922.
N. E. ¼ N. W. ¼	34	10	5	Wm. Johnson; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
S. E. ¼ N. W. ¼ & W. ½ N. W. ¼	34	10	5	R. F. Shinn; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
S. ½ S. W. ¼ & N. W. ¼ S. W. ¼	34	10	5	Wm. Duecker; also deed to Board of Directors Drainage District No. 7—taxes of 1920.
[fol. 57] S. E. ¼ & N. E. ¼ S. W. ¼	34	10	5	E. P. Burton.
W. ½ N. E. ¼	35	10	5	C. C. Sloan, C. E. Causey & Luther Bush.
N. W. ¼	35	10	5	C. C. Sloan, C. E. Causey & Luther Bush; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
E. ½ N. E. ¼	35	10	5	Luther Bush.
S. E. ¼ & E. ½ S. W. ¼	35	10	5	John R. Grobmyer—½ int.; Leo & Gazzalo Vaccaro—½ int.
W. ½ S. W. ¼	35	10	5	E. A. Rolfe & O. N. Warren.
N. E. ¼ E. or L. B. of River	36	10	5	E. P. Burton, Trustee for Farmers & Merchants Bank.
N. E. ¼ N. E. ¼ N. of River	36	10	5	Layton G. Gore.
N. W. ¼	36	10	5	Luther Bush.
E. ½ S. E. ¼	36	10	5	M. L. Turnbow; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
[fol. 58] W. ½ S. E. ¼ & S. W. ¼	36	10	5	First National Bank of Marked Tree, Arkansas.
N. E. ¼	34	11	5	Memphis Band Mill Co.

N. E. ¼ N. W. ¼ & S. ½ N. W. ¼	34	11	5	Weona Land Company.
N. W. ¼ N. W. ¼	34	11	5	Will & Minnie House.
S. E. ¼ S. E. ¼	34	11	5	Memphis Band Mill Co.
S. W. ¼ S. E. ¼ & N. ½ S. E. ¼	34	11	5	Poinsett Lumber & Mfg. Co.
S. E. ¼ S. W. ¼ & N. ½ S. W. ¼	34	11	5	Weona Land Co.
S. W. ¼ S. W. ¼	34	11	5	Amanda Pipkins.
N. E. ¼, N. W. ¼, S. E. ¼, & W. ½ S. W. ¼	35	11	5	Memphis Band Mill Company.
E. ½ S. W. ¼	35	11	5	Chapman & Dewey Land Co.
All	36	11	5	Chapman & Dewey Land Co.
[fol. 59] E. ½ N. E. ¼	4	10	6	J. B. Claunch.
W. ½ N. E. ¼ & N. W. ¼	4	10	6	T. G. Alcorn & W. E. Pittman.
S. E. ¼ & S. W. ¼	4	10	6	Tiny G. Alcorn.
All	5	10	6	H. Curtis Dewey, W. Burr Chapman & E. H. Chapman.
N. E. ¼ & S. ½	6	10	6	Northern Ohio Coop. & Lbr. Co.
N. W. ¼	6	10	6	R. B. Barton.
All	7	10	6	Northern Ohio Coop. & Lbr. Co.
All	8	10	6	Northern Ohio Coop. & Lbr. Co.
E. ½ N. E. ¼ N. & W. of River	9	10	6	Mrs. Tiny G. Alcorn.
S. E. ¼ N. E. ¼ (S. & E. of R.)	9	10	6	Henry Gilbert.
W. ½ N. E. ¼, N. W. ¼, S. E. ¼ W. of R. & S. W. ¼	9	10	6	Northern Ohio Coop. & Lbr. Co.
[fol. 60] S. E. ¼ E. of R.	9	10	6	Wilmer Smith.
All	16	10	6	Northern Ohio Coop. & Lbr. Co. except 1 square acre on Right Bank of River in extreme N. E. corner, Marked Tree Special School District.
All	17	10	6	Northern Ohio Coop. & Lbr. Co.
All	18	10	6	Northern Ohio Coop. & Lbr. Co.

List of Lands Embraced in Road District Number Seven—Cont'd

Part of section	Section	Town	Range	Record owner
N. ½ & S. W. ¼	19	10	6	Northern Ohio Coop. & Lbr. Co.
S. E. ¼	19	10	6	Farmers & Merchants Bank of Marked Tree, Ark.
N. ½	20	10	6	Northern Ohio Coop. & Lbr. Co.
N. E. ¼ S. E. ¼	20	10	6	H. B. Thorn; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
N. W. ¼ S. E. ¼	20	10	6	R. B. Vaughan.
S. ½ S. E. ¼	20	10	6	J. B. Du Bard.
S. W. ¼	20	10	6	W. P. Cooper.
[fol. 61] N. ½, S. E. ¼ & N. ½ S. W. ¼	21	10	6	Northern Ohio Coop. & Lbr. Co.
E. ½ S. E. ¼ S. W. ¼	21	10	6	E. P. Burton.
W. ½ S. E. ¼ S. W. ¼	21	10	6	W. G. Bradshaw.
S. W. ¼ S. W. ¼	21	10	6	J. B. Du Bard.
W. ½ N. E. ¼ W. of R.	28	10	6	C. C. Cummins.
N. E. ¼ R. B. of R.	28	10	6	W. G. Bradshaw.
S. E. ¼ N. E. & S. of R.	28	10	6	Geo. Hirschman.
N. W. ¼ S. of R.	28	10	6	C. C. Cummins.
N. W. ¼ N. or R. B. of R.	28	10	6	W. G. Bradshaw.
S. E. ¼ R. B. of R.	28	10	6	W. G. Bradshaw.
N. ½ S. E. ¼ L. B. of R.	28	10	6	Geo. Hirschman.
S. ½ S. E. ¼ E. of R.	28	10	6	Adam Baser
L. of R. S. W. ¼	28	10	6	C. C. Cummins.
E. ½ S. W. ¼ E. of R.	28	10	6	W. G. Bradshaw; also deed to Board of Directors Drainage District No. 7—taxes of 1922.
[fol. 62] N. E. ¼ R. B. of R.	29	10	6	J. B. Du Bard.
N. E. ¼ S. of R.	29	10	6	C. C. Cummins.

N. W. ¼ R. B. of R.	29	10	6	W. P. Cooper.
N. W. ¼ W. of R.	29	10	6	J. D. Du Bard.
S. E. ¼ S. of R.	29	10	6	C. C. Cummins.
S. W. ¼ S. of R.	29	10	6	W. P. Cooper.
S. W. ¼ R. B. of R.	29	10	6	C. C. Cummins.
N. W. ¼ S. W. ¼ N. of R.	29	10	6	S. W. Sterling.
S. W. ¼ N. E. ¼ W. of R.	30	10	6	J. G. Waskom.
N. E. ¼ S. of R.	30	10	6	W. P. Cooper.
N. ½ N. E. ¼ N. of R. & W. of San Slough	30	10	6	W. P. Cooper.
N. E. ¼ N. of R. & E. of San Slough	30	10	6	Farmers & Merchants Bank of Marked Tree, Ark.
N. W. ¼, S. W. ¼ & S. E. ¼, W. of R.	30	10	6	J. G. Waskom.
[fol. 63] S. E. ¼ within loop of river	30	10	6	C. C. Cummins.
N. E. ¼ S. & E. of R.	31	10	6	C. C. Cummins.
N. W. ¼ N. E. ¼ R. B. of R.	31	10	6	G. W. Core.
S. ½ N. W. ¼ S. of R.	31	10	6	C. C. Cummins.
N. W. ¼ R. B. of R.	31	10	6	Layton C. Core.
S. W. ¼ W. of R.	31	10	6	E. P. Burton.
S. E. ¼ & S. W. ¼ E. of R.	31	10	6	Wm. Pritchard.
Pt. S. W. ¼ S. W. ¼ E. of R. & W. of Bayou, 10 A.	31	10	6	John G. Haverstick.
N. ½ N. ½	32	10	6	C. C. Cummins.
S. ½ N. ½ & S. ½	32	10	6	Wm. Pritchard.
E. ½ W. ½ N. E. ½	33	10	6	C. E. Causey & N. J. Hazel.
W. ½ W. ½ N. E. ¼	33	10	6	J. M. Luttrell, less 1 acre School lot in N. W. corner of S. W. ¼ N. E. ¼.
[fol. 64] E. ½ N. E. ¼	33	10	6	E. M. Lincoln.
N. ½ N. W. ¼	33	10	6	P. J. Parrott.
S. ½ N. W. ¼	33	10	6	Wm. Pritchard.

List of Lands Embraced in Road District Number Seven—Cont'd

Part of section	Section	Town	Range	Record owner
N. W. ¼ N. W. ¼ S. E. ¼	33	10	6	J. N. Luttrell.
E. ½ S. E. ¼	33	10	6	E. M. Lincoln.
N. E. ¼ N. W. ¼ S. E. ¼, S. ½ N. W. ¼ S. E. ¼ & S. W. ¼ S. E. ¼	33	10	6	C. E. Causey & N. J. Hazel.
S. E. ¼ S. W. ¼ & S. ½ N. E. ¼ S. W. ¼	33	10	6	J. M. Luttrell.
W. ½ S. W. ¼ & N. ½ N. E. ¼ S. W. ¼	33	10	6	Wm. Pritchard.
All	31	11	6	Chapman & Dewey Land Co.
All	32	11	6	Chapman & Dewey Land Co.
All	33	11	6	Kansas City & Memphis Farms Company.

[fol. 65] CERTIFICATE OF J. BRINKERHOFF—Filed Jan. 16, 1924

This is to Certify that the annexed and foregoing six (6) pages contain a list of all of the lands embraced within the boundaries of Road District Number Seven (7) of Poinsett County, Arkansas, with the name of the record title owner set opposite each tract, so far as I am able to ascertain after a careful examination of the records of Poinsett County, Arkansas.

Witness my hand at Harrisburg, Arkansas, on this the 12th day of January, 1924.

J. Brinkerhoff, Abstracter.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS, DECEMBER TERM, 1923

ARGUMENT AND SUBMISSION

Wednesday, January 16, 1924.

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. F. Gautney for appellant, continued by Mr. G. B. Rose for appellee, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

[fol. 66] DECEMBER TERM, 1923

Thursday, January 17, 1924.

This cause having been called for further hearing, argument was resumed by Mr. G. B. Rose for appellee and concluded by Mr. Henry D. Ashley for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 67] In United States Circuit Court of Appeals

[Title omitted]

Opinion—Filed March 28, 1924

Mr. J. F. Gautney and Mr. Henry D. Ashley for appellant.
Mr. G. B. Rose (Mr. D. H. Cantrell, Mr. J. F. Loughborough and Mr. A. W. Dobyns were with him on the brief), for appellee.

Before Stone and Kenyon, Circuit Judges, and Phillips, District Judge

Stone, Circuit Judge, delivered the opinion of the Court.

This is a bill by a trustee, for bondholders under a so-called mortgage, to obtain the appointment of a receiver and the payment of past due bonds and interest coupons issued by a road improvement district. The defendant is a road district organized under a special act of the Arkansas Legislature for the purpose of building a road to be paid for from special benefit assessments upon land in the district. Various owners of such land intervened in opposition to the bill. The decree established the validity of the mortgage, the amount and ownership of the bonds outstanding and the delinquency of the district as to interest and adjudged that [fol. 68] a receiver should be appointed to collect the assessments theretofore levied on the land in the district. From that decree, this appeal is brought.

Appellants state fourteen points in their brief, seven of which, they argue. In the view taken by this court, it is necessary to examine but one of these. The jurisdiction of the trial court is challenged on the ground that the contract between the bondholders and the district provided, in case of default in payment, for appointment of a receiver by the state Chancery court for the purpose of collecting assessments to pay the obligations due the bondholders and that such contract made that remedy and that forum the exclusive resort for such relief. The statute, authorizing organization of the district and the issuance of bonds, provides that the Chancery Court of Poinsett County may, in case of default on the bonds, appoint a receiver to collect assessments and pay the bonds. The argument is that the remedy became part of the contract with the bondholders. Appellee answers this contention by claiming that the statute creating the district provided for the appointment of such receiver by the state Chancery court and that "it is elementary law that no jurisdiction can be conferred upon a state court without conferring a similar jurisdiction upon the Federal Courts." Thus, this contention presents for determination the jurisdiction of the trial court to appoint a receiver herein.

A remedial right to proceed in a federal court cannot be enlarged or diminished by a state statute. Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497. The Hanssen case involved the right of a federal

court to appoint a receiver under conditions where a state statute gave such right to the state court.

We are, therefore, remitted to the inquiry as to whether a federal court of equity has jurisdiction to appoint a receiver such as here sought. Of course, the general power to appoint receivers, in proper cases and under proper circumstances, inheres in federal equity jurisdiction. Therefore, the question here is whether federal courts can appoint receivers for the purposes set forth in this bill. Those purposes are to collect and enforce payment of such portion of the benefits assessed against the land in this district as may be necessary to pay the claims of the bondholders. A district such as this is a public corporation or quasi-public-corporation (Essex Road Dist. v. Skinkle, 140 U. S. 334, 339; Fallbrook Irr. Dist. v. Bradley, 164 [fol. 69] U. S. 112, 174; Tregea v. Modesto Irr. Dist., 164 U. S. 179, 186), and assessments levied against benefits to pay for such public improvements are taxes (Heine v. Levee Comm'rs., 19 Wall. 655, 630; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 176; Bauman v. Ross, 167 U. S. 548, 588; Norwood v. Baker, 172 U. S. 269, 277). It has been repeatedly held that a federal court of equity has no jurisdiction to levy or collect taxes (Walkley v. City of Muscatine, 6 Wall. 481; Rees v. City of Watertown, 19 Wall. 107; Raton Water Works Co. v. Raton, 174 U. S. 360, 364; Graham v. Folsom, 200 U. S. 248, 253). This principle has been applied to benefit assessments—Heine v. Levee Comm'rs., 19 Wall. 655—where it was said (p. 661):

"It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government."

This principal has, also, been applied where a part of the relief sought was a receiver (Thompson v. Allen County, 115 U. S. 550) and even where the state statute authorized a receiver (Meriwether v. Garrett, 102 U. S. 472). In the Meriwether case, the court said (p. 515):

"The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the state and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

"It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such reme-

dies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments [fol. 70] of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and in essential to its successful administration."

This court, in an opinion concurred in by Mr. Justice Van Devanter, applied the same rule to a case where a receiver was sought to collect benefit assessments in a street grading district in Arkansas (Street Grading District No. 60 v. Hagadorn, 186 Fed. 451). For statement of the same principle as recognized concerning state courts see McLean County v. Bank, 81 Ky. 254—Generally see Dillon on Municipal Corporations (5th Ed.) sec. 336.

The above citations rule the point now before us. The trial court had no jurisdiction to appoint the receiver herein. It is true that the bill alleged, also, that there were large sums of money in the hands of the district on deposit which should be cared for and applied to the payment of the bonds "if setting aside of said assessment is to stand" (the quoted matter referring to the suit in the state Chancery court). Also, a portion of the prayer was "that any moneys on hand belonging to said district be applied to the payment of said bonds and coupons thereto attached." However, no banks or alleged depositories were made parties; no evidence of funds being on deposit was offered; no situation involving any such deposits appeared anywhere in the trial; the court made no decree relating thereto. The sole relief decreed by the court was the appointment of a receiver to collect these assessments. As the court had no jurisdiction to appoint a receiver and as there was no evidence as to any deposited funds belonging to the district, the court should have dismissed the bill without prejudice at the costs of appellee and

It is so ordered.

[fol. 71] In United States Circuit Court of Appeals

[Title omitted]

Decree—Filed March 28, 1924

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Road Improvement District No. 7 of Poinsett County, Arkansas, have and recover against the Guardian Savings and Trust Company, Trustee, the sum of — Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said District Court with directions to dismiss the bill without prejudice at the costs of plaintiff, appellee in this Court.

March 28, 1924.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Road Improvement District No. 7 of Poinsett County, Arkansas, was Appellant and the Guardian Savings and Trust Company, Trustee, was Appellee, No. 6422, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifth day of May, A. D. 1924.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 73] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 1029

GUARDIAN SAVINGS & TRUST COMPANY, Trustee, Petitioner,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS

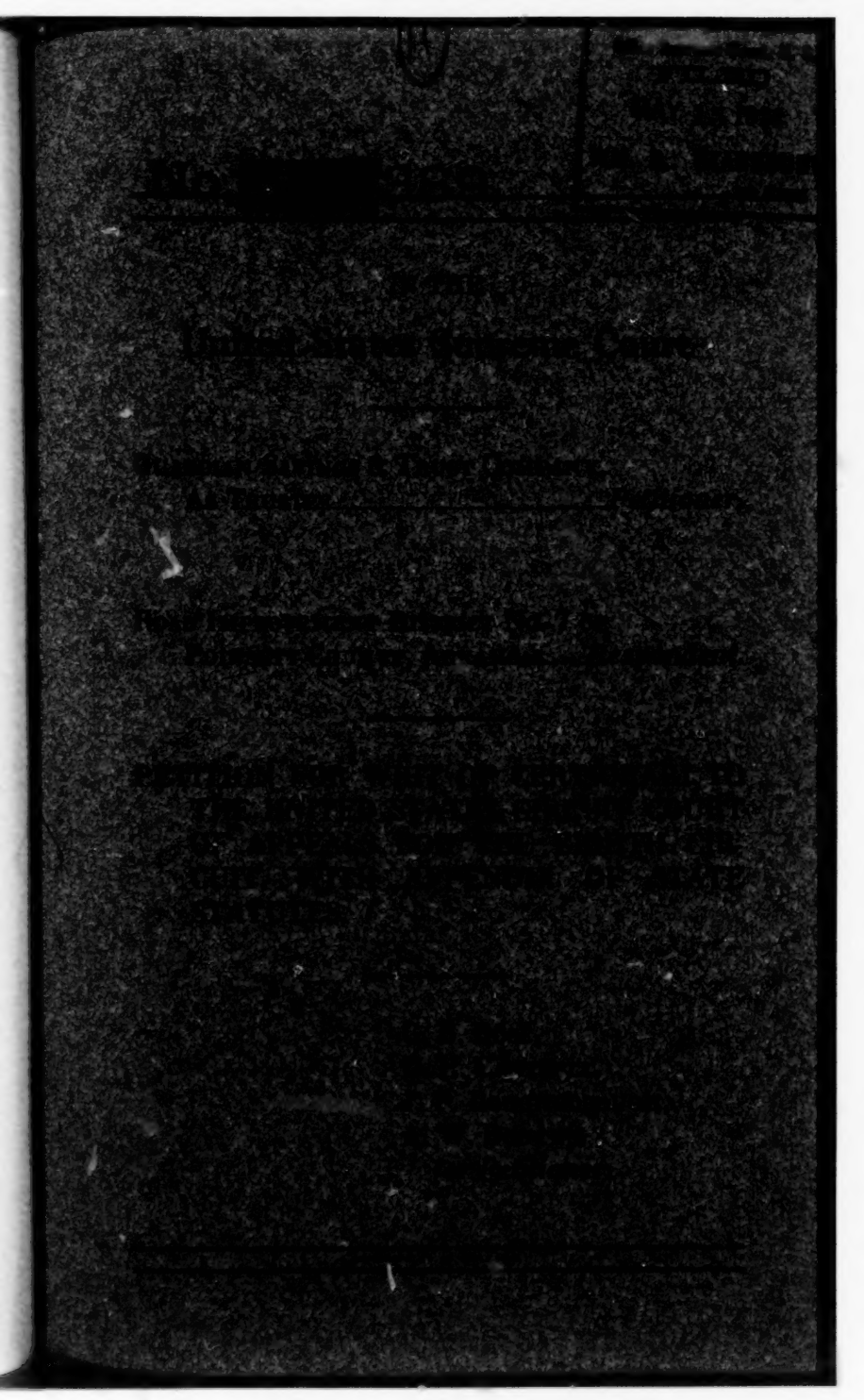
On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

ORDER ALLOWING PETITION FOR WRIT OF CERTIORARI—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Eighth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

June 9, 1924.



IN THE

United States Supreme Court

GUARDIAN SAVINGS & TRUST COMPANY,
AS TRUSTEE.....*Petitioner,*

v.

ROAD IMPROVEMENT DISTRICT NO. 7 OF
POINSETT COUNTY, ARKANSAS.....*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, WITH APPENDIX OF STATE STATUTES.

In 1919 cotton in Arkansas was selling at 65 cents a pound, and rice at $3 a bushel. People generally bought automobiles and wanted improved roads.

The Arkansas Legislature of that year passed special road acts that fill two large printed volumes, including the act now before the court, which is No. 322, Vol. 2, p. 1413, of the Road Acts of 1919.

In 1920 the Governor called a special session, which passed as many more that have not been printed.

The State of Arkansas, by the first amendment to its Constitution of 1874, prohibited the legislature from ever paying the greater part of its then bonded debt, and thereby so impaired its credit that it was realized that to make the bonds of these districts saleable it was necessary to give special guaranties that could be enforced by the Federal courts.

It was realized that obligations must be incurred and remedies must be furnished that would not be within the decisions in *Merriwether* v. *Garrett*, 102 U. S. 472, and in *Street Improvement District No. 60* v. *Hagadorn*, 186 Fed. 451, where it was held that the term pledge as there used referred merely to the colloquial one of faith and credit and the Federal courts could not, without statutory authority, take the affairs of a municipal corporation or improvement district out of the hands of its administrative officers by the appointment of a receiver; but that the plenary jurisdiction of the Federal courts must be made plain beyond question. Accordingly, the acts, which are all in substantially the same form, provide that the assessment of benefits shall be filed with the county clerk with the right of a review in the courts.

In *St. Louis S. W. Rd. Co* v. *Road Impt. Dist. No. 2 of Lafayette County*, 257 U. S. 547, this court held that this was a judicial proceeding which could be removed to the Federal court.

The acts provide that the installments of the assessment of benefits shall all be levied at once, running through a term of years sufficient to pay the bonds as they serially mature. This levy is made by the county court, with the right of appeal to the circuit and supreme courts, and is therefore a judicial act.

The districts are authorized to issue bonds, and to pledge and *mortgage* the assessment of benefits for their security. Such mortgages of intangible assets have often been sustained by this court in railroad foreclosures, where mortgages of franchises and rents and profits have been enforced.

The annual installments of the assessment of benefits are spread on the taxbooks, so that the property owner can pay them along with his other taxes if he so desires; but if he fails to do so, they are not enforced by administrative sale. The collector reports them to the board of commissioners of the district, who must collect them by suit.

If it fails to do this, so that there is a default for thirty days in the payment of bonds or cou-

pons, it is made the duty of the chancery court to appoint a receiver, who brings the suits, collects the installments of the assessed benefits, and pays the bonds.

Copies of the material portions of the statute creating the district now in suit are attached hereto as an appendix. All the other statutes are substantially identical.

It will be seen that every act in the levy and collection of the installments of the assessed benefits is a judicial act, which can as well be performed by a Federal as by a State court.

Under these statutes, 265 road districts were organized in Arkansas, and they issued bonds to the amount of $66,000,000, which are now outstanding in the hands of innocent purchasers, many of whom are women, guardians, estates, savings banks and eleemosynary institutions all over the land.

Within three years after the passage of these acts, cotton suddenly fell to 6 cents a pound, rice to 25 cents a bushel. Many districts defaulted. About 20 were placed in the hands of receivers appointed by the Federal courts. Then all paid up, perceiving that if they did not pay voluntarily, they would have to pay with the cost of a Federal receivership added.

Among the defaulting districts was the one whose name appears in the caption of this peti-

tion. Sundry landowners were admitted to defend, and alleged that the act creating the district and its assessment of benefits were void. The district court overruled their defense, and appointed a receiver. An appeal was taken, and the Circuit Court of Appeals of the Eighth Circuit, citing *Merriwether* v. *Garrett*, 102 U. S. 472, where the receiver provided for was a State officer to be appointed by the governor and not by a court, and *Street Improvement District No. 60* v. *Hagadorn*, 186 Fed. 451, where there was no statute authorizing a receivership and merely a pledge of faith and credit, held that the Federal court had no jurisdiction to appoint a receiver, and remanded the cause, with directions to dismiss the bill without prejudice.

The court below failed to realize that here there was no judicial usurpation, no superseding by the court of an administrative machine that could have been forced by mandamus to act, and that the Federal courts were merely doing what the State courts must do if the bonds are to be paid, and were exercising a purely judicial function.

If the decision of the Circuit Court of Appeals is suffered to stand, the holders of Arkansas improvement district bonds for roads, levees and drains are denied the contract rights for enforcement of payment, on the faith of which they were purchased. The levee and

drainage districts, seeing that there is no danger of a Federal receivership, may follow suit, and the defaults may exceed $100,000,000.

The bonds were purchased with the knowledge that, under the rule laid down in *Davis* v. *Gray*, 16 Wall. 221, and so often quoted with approval by this court since, the holders would have the right to seek relief in the Federal courts. That rule is as follows:

> "A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights."

The theatened confusion, impairment of credit and loss to innocent holders of bonds is so enormous that we pray for a certiorari upon the following grounds:

1. The rule laid down by the Circuit Court

of Appeals in this case is in conflict with the rule laid down by this court in the following cases:

Supervisors v. *Rogers*, 7 Wall. 175.

Suydam v. *Broadnax*, 14 Peters 75.

Union Bank of Tennessee v. *Jolly*, 18 Howard, 504, 507.

Cowles v. *Mercer County*, 7 Wallace, 118, 122.

Ex Parte McNeil, 13 Wallace 243.

Case of Broderick's Will, 21 Wallace 520.

Cummings v. *National Bank*, 101 U. S. 157.

Holland v. *Challen*, 110 U. S. 24.

Hess v. *Reynolds*, 113 U. S. 77.

Gormley v. *Clark*, 134 U. S. 348.

Lawrence v. *Nelson*, 143 U. S. 215.

Chicot County v. *Sherwood*, 148 U. S. 532, 533.

Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 391.

Crowley v. *Northern Pac. R. R. Co.*, 159 U. S. 582.

Smyth v. *Ames*, 169 U. S. 516.

Tennessee Coal Co. v. *George*, 233 U. S. 345.

Spokane Inland R. R. v. *Whitley*, 237 U. S. 494.

Missouri, Kansas & Texas Trust Co. v. *Krumseig*, 172 U. S. 351.

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 296.

Commissioners Road Imp. District No. 2 of Lafayette County v. *St. Louis S. W. Ry. Co.*, 257 U. S. 547.

The Federal court, having jurisdiction of Poinsett County, is the "chancery court of Poinsett County," in a suit between citizens of different States.

2. Said rule is at variance with the rule laid down by other Circuit Courts of Appeal in the following cases, thus creating a conflict between the decisions of these courts:

Missouri, Kansas & Texas Trust Co. v. *Krumseig*, 77 Fed. 32.

Ames v. *Union Pacific Ry. Co.*, 64 Fed. 172.

Darragh v. *H. Wetter Mfg. Co.*, 78 Fed. 7, 13, 14.

Gillis v. *Downey*, 85 Fed. 488.

National Surety Bank v. *State Bank*, 120 Fed. 593, 603.

Sawyer v. *White*, 122 Fed. 227.

Jones v. *Mutual Fidelity Co.*, 123 Fed. 511, 517.

Barber Asphalt Co. v. *Morris*, 132 Fed. 945, 949, 950.

Schurmeier v. *Connecticut Mutual Life Ins. Co.*, 137 Fed. 46.

Harrison v. *Remington Paper Co.*, 140 Fed. 399.

Brun v. *Mann*, 151 Fed. 152.

North Carolina Mining Co. v. *Westfeldt*, 151 Fed. 297.

Morrill v. *American Reserve Bond Co.*, 151 Fed. 311, 313.

Central Georgia Ry. Co. v. *McLendon*, 157 Fed. 966, 967.

Platt v. *Lecocq*, 158 Fed. 723, 727.

McClellan v. *Carland*, 187 Fed. 919.

Bailes v. *Advance-Rumley Thrasher Co.*, 263 Fed. 676.

Puget Sound Power & Light Co. v. *City of Seattle*, 271 Fed. 959.

St. Louis S. W. Ry. Co. v. *Comm'rs Road*

Imp. Dist. No. 2 of Lafayette County, 265 Fed. 524.

3. Since the appointment of the receiver in this case, the Arkansas Legislature has passed Act No. 620 of the year 1923 (Special Acts, p. 1519), abolishing the defendant district and making no provision for the payment of its bonds, so that no action can be maintained at law and no relief had in the State courts. A copy of that act is attached to this petition.

4. There are pending in the Federal courts for the Eastern and Western Districts of Arkansas more than twenty suits in which receivers of such districts have been appointed, and if the decision of the Circuit Court of Appeals in this case is enforced, great confusion will result.

5. The pledge and mortgage of uncollected assessments is a pledge and mortgage of income, of which a court of equity has complete jurisdiction even in the absence of a statute expressly conferring it, and appointment of a receiver is proper in such cases.

American Bridge Co. v. *Heidelbach*, 94 U. S. 483.

Galveston v. *Cowdrey*, 11 Wallace, 483.

Atlantic Trust Co. v. *Dana*, 128 Fed. 217.

If the district has power to pledge or mortgage the assessments and revenues, a suit for a

receiver to enforce the pledge, either as a mortgage or trust, may be brought in equity without recovering judgment at law.

Ober v. *Gallegher*, 93 U. S. 199, 208.

Case v. *Beauregard*, 101 U. S. 688, 690.

Whenever a creditor has a trust in his favor or a lien on property for the debt due him, he may resort to equity without exhausting process at law.

Wymon v. *Wallace*, 201 U. S. 242.

Closser v. *Strawn*, 227 U. S. 242.

All possible trusts, whether express or implied, are within the jurisdiction of equity.

Clews v. *Jamieson*, 182 U. S. 461, 479.

Oelrichs v. *Spain*, 15 Wall. 211.

George v. *Wallace*, 135 Fed. 286, 292.

The Arkansas statute expressly provided for the appointment of a receiver by a court of equity and this provision was part of the contract that could not lawfully be repealed.

No reason can be suggested why the State cannot authorize the mortgage of assessments of benefits and the appointment of a receiver for their collection; and, as was said by this court in *Rees* v. *Watertown*, 19 Wall 107:

"The remedies for collection of the

> debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantialy preserved to the creditor. * * * All laws in existence when the contract is made are necessarily referred to in it, and form a part of the measure of the obligation of the one party and of the right acquired by the other."

Where there is a mortgage, jurisdiction in equity and a receivership follow, just as a mandamus follows a judgment at law.

The United States courts would enforce this.

Supervisors v. *Rogers*, 7 Wallace 175.

An enlargement of equitable rights given by a State statute may be administered by the U. S. court as well as by the courts of that State.

Bailes v. *Advance-Rumley Thrasher Co.*, 263 Fed. 676 (8th C. C. A. Court).

Devine v. *Los Angeles*, 202 U. S. 313, 333.

Holland v. *Challen*, 110 U. S. 15.

Darragh v. *Wetter Mfg. Co.*, 78 Fed. 7, 13.

Platt v. *Lecocq*, 158 Fed. 723.

In *Supervisors* v. *Rogers*, 7 Wallace 175, it was held that, where the State statute authorizes the State court to appoint a commissioner of the court to collect taxes to pay county bonds, the U. S. court may make the appointment. The commissioner there was the exact equivalent of the receiver here, and the mortgage here takes the place of the judgment there.

6. In *State Bank of Wellston* v. *Mississippi Valley Trust Co.*, decided March 21, 1924, and not yet published in the Federal Reporter, the Circuit Court of Appeals of the Eight Circuit, Judges Sanborn and Munger presiding, upheld the jurisdiction of the court to enforce a mortgage under a statute identical with the one now before the court; so that their decision is in conflict with the decision of the same court rendered by Judges Stone, Kenyon and Phillips and now sought to be reviewed.

Respectfully,

THE GUARDIAN SAVINGS & TRUST COMPANY,

By

G B Rose

D V Gantrell

A F Longborough

Law Dobyns

Solicitors.

APPENDIX.

The material portions of the act creating this district are as follows:

Section 4. It is made the duty of said commissioners to proceed as rapidly as possible with the improvement of the road hereinbefore described, improving it in such manner as they deem to the best interests of the property owners, and they shall also maintain said road in good condition after its completion. As soon as possible, the commissioners of said district shall form their plans for the improvement, with the aid of the State Highway Department and of such engineers as they see fit to employ, and shall file the same with the county clerk of Poinsett County, along with specifications and an estimate of the cost. If said commissioners deem it to the best interest of the district to vary the line of the road, as hereinbefore laid out, they may report that fact to the county court of Poinsett County, and in that event, if he county court approves of the report, it may make an order changing the route of the road, and if necessary it shall, in that event, lay out the new road in the manner hereinbefore provided.

Section 5. Said commissioners shall proceed to assess the land within the district, and shall inscribe in a book each tract of land, and shall assess the value of the benefits to accrue

to each tract by reason of such assessment, and shall enter such assessment of benefits opposite the description, together with the estimate of the probable cost to the landowner. Their assessment shall embrace not merely the lands, but all railroads, tramroads, telegraph, telephone and pipe lines, and other improvements on real estate that will be benefited by the improving of the road; and wherever the word "lands" is used in this act, it shall be construed to embrace all property subject to taxation herein. The assessors shall place opposite each tract the name of the supposed owner, as shown by the last county assessment list. The commissioners shall also assess all damages that will accrue to any landowner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such damages as to any tract of land, it shall be deemed a finding by them that no damages will be sustained.

Section 7. The assessment of benefits of said district shall be filed with the county clerk of Poinsett County, and the secretary of the board shall thereupon give notice of its filing by publication for two weeks in a newspaper published and having a bona fide circulation in that county. This notice may be in the following form:

ROAD IMPROVEMENT DISTRICT NUMBER 7 OF POINSETT COUNTY.

Notice is hereby given that the assessment of benefits and damages of the above district has been filed in the office of the county clerk of Poinsett County, where it is open to inspection. The following lands, not in the district as originally laid out, have been assessed for the improvement:

(Here will follow description of the lands beyond the borders of the district which have been assessed).

All persons wishing to be heard on said assessment will be heard by the commissioners of said district at the county court room at Harrisburg, in Poinsett County, on the ..... day of ....., 19.....

.....

Secretary.

On the day named in said notice, it will be the duty of the commissioners to meet at the place named, and to hear all complaints against said assessment, and to equalize and adjust the same, and their determination shall be final, unless suit is brought in the chancery court of the county where the lands lie within thirty days thereafter to set aside their finding.

Section 9. The county court shall, at the time that the assessment of benefits is filed, or at any time subsequent, enter upon its record an order, which shall have all the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement, with ten per cent added for unforeseen contingencies, which tax is to be paid by the real property in the district in the proportion to the amount of the assessment of benefits thereon, and which is to be paid in annual installments, payable not to exceed ten per cent for any one year, as provided in such order. The tax so levied shall be a lien upon all the real property in the district from the time that the same is levied, and shall be entitled to preference over all demands, executions, incumbrances or liens whensoever created, and shall continue until such assessment, with any penalty and costs that may accrue thereon, shall have been paid. The remedy against such levy of taxes shall be by appeal, and such appeal must be taken and perfected within twenty days from the time that said levy has been made, and on such appeal the presumption shall be in favor of the legality of the tax.

Section 13. All taxes levied under the terms of this act shall be payable between the first Monday in January and the tenth day of

April of each year; and if any taxes levied by the board in pursuance of this act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in the chancery court of Poinsett County in the manner provided by sections 23 and 24 of Act No. 279 of the General Assembly of the State of Arkansas of the year 1909, entitled, "An Act to provide for the creation of drainage districts in this State," approved May 27, 1909; but the owner of property sold for taxes thereunder shall have the right to redeem it at any time within two years from the time his lands have been stricken off by the commissioner making the sale.

Section 17. In order to do the work, the board may borrow money at a rate of interest not exceeding six per cent per annum, may issue negotiable bonds therefor, signed by the members of the board, and may pledge and mortgage all assessments for the repayment thereof.

Section 20. All bonds issued by the commissioners, under the terms of this act, shall be secured by a lien on all lands, railroads and tramroads in the district, and the board of com-

missioners shall see to it that a tax is levied annually, and collected under the provisions of this act, so long as it may be necessary to pay any bond issued or obligation contracted under its authority; and the making of said assessment or levy and collection may be enforced by mandamus.

If any bond or interest coupon on any bond issued by said board is not paid within thirty days after its maturity, it shall be the duty of the chancery court of Poinsett County, on application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the taxes aforesaid, and an assessor to reassess the benefits, if necessary; and the proceeds of such taxes and collections shall be applied, after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said board which are then due and payable; and the said receiver may be directed by suit to foreclose the lien of said taxes on said lands; and the suits so brought by the said receiver shall be conducted in all matters as suits by the board as hereinbefore provided, and with like effect; and the decrees and deeds therein shall have the same presumptions in their favor.

The material part of section 23 of the drainage act of 1909, referred to in section 13 of the act creating this district, is as follows:

Section 23. All taxes levied under the terms of this act shall be payable between the first Monday in January and the 10th day of April of each year; and if any taxes levied by the county court in pursuance to this act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of 25 per cent; and said board of commissioners shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated, having chancery jurisdiction; and said court shall give judgment against said lands, railroads or tramroads for the amount of such taxes and said penalty of 25 per cent and interest on same, from the end of said sixty days allowed for the collection thereof, at the rate of six per cent per annum and all costs of the proceedings. Such judgment shall provide for the sale of said delinquent lands for cash, by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of said lands be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such lands, and not against any other property or estate of said defendant. All or any

part of said delinquent lands, railroads or tramroads for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid; and notice of the pendency of such suit shall be given by publication weekly for four weeks before judgment is entered, for the sale of said lands, railroads or tramroads, in some newspaper published in the county where such suits may be pending, which public notice may be in the following terms:

Board of Commissioners.....Drainage District,

v.

Delinquent Lands.

All persons having or claiming an interest in any of the following described lands are hereby notified that suit is pending in the chancery court of ..... County, Arkansas, to enforce the collection of certain drainage taxes on the subjoined list of lands, each supposed owner having been set opposite his or her or its lands, together with the amounts severally due from each, to-wit:

(Then shall follow a list of supposed owners, with a descriptive list of said delinquent lands, and amounts due thereon respectively as aforesaid), and said public notice may conclude in the following form:

All persons and corporations interested in

said lands are hereby notified that they are required by law to appear within four weeks and make defense to said suit, or the same will be taken for confessed, and final judgment will be entered directing the sale of said lands for the purpose of collecting said taxes, together with the payment of interest, penalty and costs allowed by law.

_____

Clerk of Said Court.

And said suit shall stand for trial at the first term of court after the complaint may be filed, if said four weeks shall expire either before the first day of the term or during the term of court to which said suits are brought, respectively, unless a continuance be granted for good cause shown, within the discretion of the court: and such continuance, for good cause shown, may be granted as to a part of said lands or defendants, without affecting the duty of the court to dispose finally of the others as to whom no continuance may be granted, and in all cases where notice has been properly given as aforesaid, and where no answer has been filed, or, if filed, and the cause decided for the plaintiff, the court by its decree shall grant the relief as prayed for in the complaint, and shall direct said commissioner to sell the lands, railroads and tramroads described in the complaint at the courthouse door of the county wherein the decree is entered,

at public outcry, to the highest and best bidder for cash in hand, after having first advertised such sales (such advertisement may include all the lands described in the decree) weekly for two weeks consecutively, in some newspaper published in the county, if there be one, and if no newspaper, then that such advertisement be published in some newspaper in an adjoining county; and if all the lands, railroads and tramroads be not sold on the day as advertised, such sale shall continue from day to day until completed; and said commissioner shall by proper deeds convey to the purchaser the lands, railroads and tramroads so sold, and the title to said lands, railroads and tramroads shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and to insane persons having no guardian or curators the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed.

ACT 624.

An Act to repeal Act No. 322 of the General Assembly of the State of Arkansas for the year 1919, entitled: "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas," approved March 21, 1919, and to repeal Act No. 45 of the Extraordinary Session of the General Assembly of the State of Arkansas for

the year 1920, entitled: "An Act to amend Act No. 322 of the General Assembly of the State of Arkansas for the year 1919," approved February 4, 1920, and for other purposes.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. That Act No. 322 of the General Assembly of the State of Arkansas for the year 1919, entitled: "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas," approved March 21, 1919, and also Act No. 45 of the Extraordinary Session of the General Assembly of the State of Arkansas for the year 1920, entitled: "An Act to amend Act No. 322 of the General Assembly of the State of Arkansas for the year 1919," entitled: "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas, and to confirm the assessment of benefits in said improvement district," approved February 4, 1920, be and each of them are hereby repealed.

Section 2. Be it further enacted that any and all persons, firms and corporations having claims against said district for money advanced, paid or expended in defraying the preliminary costs and expenses for preliminary surveys, engineers' fees, attorneys' fees, and court costs, incurred or expended prior to the time of the assessment of benefits in said district, which

assessment was filed in the office of the county clerk of Poinsett County, Arkansas, may file an itemized, verified claim therefor in the county court of Poinsett County, Arkansas, within six months from the date of the approval of this Act. When so filed said court may allow said claim, if found correct, or reject the same, and in the event said claim is allowed or rejected by the county court, the claimant or any landowner in said district, as the case may be, may appeal from such order of said court to the circuit court. After all claims have been allowed or rejected, and the time for allowance and appealing from allowance or rejection thereof has expired, the county court shall make an order appointing three persons, landowners in the district, as commissioners to assess a tax upon the real estate within the boundaries of the district, as described in Act No. 45 of the Extraordinary Session of the General Assembly of Arkansas, approved February 4, 1920, sufficient to pay said claims so allowed and ascertained by the county court as aforesaid. When said commissioners shall have assessed said tax in accordance with this Act, they shall file said assessment in the office of the clerk of the county court of said county, who shall thereupon certify and extend the same upon the real estate taxbooks of said county, to the collector of said county for collection, and said collector shall thereafter, at the

time and in the manner now provided by law for the collection of State and county taxes against real estate, collect said taxes and pay the same over to the treasurer of the county, and report his action to the next term of the county court held after such collection.

In the event of delinquency or failure of the landowners to pay such taxes, the collector shall offer such delinquent lands for sale at the time, place and in the manner now required by law for sale of lands delinquent for State and county taxes, and if said taxes be not paid before sale, shall sell the same in accordance with the laws providing for the sale of land delinquent for State and county taxes, for the taxes assessed by the commissioners against said land, interest thereon at six per cent and costs of sale. At such sales the clerk of the county court shall issue to purchasers of any of the said delinquent lands his certificate of purchase, and after the expiration of the time allowed by law for the redemption of the lands sold for State and county taxes, shall issue to the purchaser at such sale, or his assignee, his clerk's tax deed therefor, all of said acts to be done and performed by said clerk in the manner now required by law for the sale of lands, delinquent for State and county taxes. The owner of any land, sold at such delinquent tax sale, may, within the time prescribed by law for the

redemption of lands sold for State and county taxes, redeem the lands so sold for said taxes, by paying to the clerk of the county court the amount of taxes, interest and costs paid by the purchaser at said sale, together with interest thereon at the rate of twenty-five per cent per annum from the date of such sale to the date of redemption. Said clerk shall thereupon issue his certificate of redemption from said sale, to said person so applying to redeem said land, and pay the money so collected by him over to the treasurer of said county, to the credit of the purchaser at said delinquent tax sale.

Section 3. When said taxes have been collected and paid in the manner hereinbefore prescribed, the same shall be paid over by the collector, or the clerk, as the case may be, to the treasurer of the county, who shall place said funds to the credit of the district for the purpose of paying the claims as aforesaid. Thereafter any person holding a final order or judgment allowing his claim, may present a certified copy thereof to the treasurer, and thereupon the treasurer shall draw a warrant payable to such claimant, or his assignee, in a sum sufficient to pay the amount of said claim.

Section 4. Be it further enacted, that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Section 5. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared and this Act shall take effect and be in force immediately after its passage.

Approved March 23, 1923.

FILED
NOV 17 1924
WM. R. STANSBU
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IN THE

United States Supreme Court

GUARDIAN SAVINGS & TRUST COMPANY,
TRUSTEE ..... *Petitioner,*

v. No. 389.

ROAD IMPROVEMENT DISTRICT NO. 7 OF
POINSETT COUNTY, ARKANSAS ..... *Respondent.*

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER, WITH APPENDIX OF ARKANSAS STATUTES.

G. B. ROSE.
D. H. CANTRELL.
J. F. LOUGHBOROUGH.
A. W. DOBYNS.
Attorneys for Petitioner.

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IN THE

United States Supreme Court

GUARDIAN SAVINGS & TRUST COMPANY,
TRUSTEE ..... *Petitioner,*

v. No. 389.

ROAD IMPROVEMENT DISTRICT NO. 7 OF
POINSETT COUNTY, ARKANSAS..... *Respondent.*

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER, WITH APPENDIX OF ARKANSAS STATUTES.

STATEMENT OF THE CASE.

Respondent is a special assessment road improvement district, created by a special act of the Legislature of Arkansas at its session in the year 1919. (Arkansas Road Acts of 1919, Vol. 2, p. 1413). The act provided for the

improvement of a road; described the lands that would be benefited; appointed the commissioners to form plans, assess the value of the benefits to each tract of land, which should be confirmed and become incontestable after the notice and hearing provided for in the act, with provisions for appeal to the courts within thirty days after the equalization. After the confirmation of the assessment, the county court should enter an order and judgment, levying the installments of the assessment of benefits to be paid in each year, not exceeding 10% in any year, until the full amount of the benefits should be paid or the improvement work was paid for; and this levy was made a first lien on each tract of land in the district. These levies of the installment of the assessments, called taxes in the act, were to be spread annually on the taxbooks of the county; but if not paid voluntarily, were to be collected by a suit or suits brought by the commissioners, and not by administrative sale. The act conferred power on the commissioners of the district to borrow money for the work, to issue bonds, and to secure their payment by a pledge and mortgage of the assessment of benefits. It also provided that if any bond or interest coupon was not paid within thirty days after becoming due, the chancery court should appoint a receiver to col-

lect the installments of the assessment of benefits, or tax, and pay the bonds.

An assessment of benefits, amounting to $462,000, was filed by the commissioners with the county clerk on December 16, 1919. On February 4, 1920, at a special session of the General Assembly of the State of Arkansas, an act was passed confirming this assessment and approving the plans.

On May 18, 1920, the commissioners of the district issued $230,000 of negotiable coupon bonds, and executed to the Guardian Savings & Trust Company, of Cleveland, Ohio, as trustee, an instrument of pledge and mortgage of the uncollected assessment of benefits. This instrument was duly recorded in the mortgage records of Poinsett County. The bonds were sold immediately to James Gould & Son, who resold them on June 15, 1920, to Otis & Company of Cleveland, by whom they were purchased in good faith at par and before maturity. Of the proceeds of the bond issue, $212,750 was placed to the credit of the district by Otis & Company, and of this deposit the commissioners checked out $111,110.

Certain property owners filed suit in the State chancery court of Poinsett County against the commissioners of the district, asking that the assessment of benefits be set aside, and that

the officers whose duty it was to collect them be restrained from so doing. A decree was rendered in that case in July, 1922, setting aside the assessment of benefits and restraining the county clerk from extending them, and the commissioners and sheriff from collecting them, because a drainage district had appropriated some of the lands of the road district for a floodway. This decree expressly recited that it should not affect any rights claimed by the bondholders, who were not parties to the suit.

The interest coupons due September 1, 1920, and March 1, 1921, not having been paid, on August 15, 1922, petitioner filed its complaint in the District Court of the United States for the Jonesboro Division of the Eastern District of Arkansas, for the foreclosure of the pledge and mortgage, and praying the appointment of a receiver to collect the delinquent taxes and apply them on the bonds. Some of the property owners asked and obtained leave of the district court to appear therein and defend in the name of the district. By agreement the case was transferred to the Eastern Division.

On April 2, 1923, the district court rendered a decree in this case, finding that the bonds to the amount of $111,110 were valid obligations of the district, and that there was past due thereon interest amounting to $13,099.80, making the total amount due on said bond issue

$124,209.80, and that the remainder of the $230,000 bond issue should be canceled and returned to the commissioners. This was done, and a receiver was appointed to collect the delinquent installments of the assessment of benefits, and apply his collections upon the bonds.

From this decree an appeal was taken by the intervening property owners in the name of the district to the Circuit Court of Appeals, and on a hearing there that court held that the district court had no jurisdiction to entertain the suit or to appoint a receiver.

In the meantime, on March 23, 1923, the Legislature of the State of Arkansas passed an act expressly repealing the act creating the district and confirming the assessment of benefits. It provided that the affairs of the district should be wound up and only its preliminary expenses paid. No provision was made for the payment of the bonds.

A copy of all material parts of the three acts of the Legislature of Arkansas herein referred to is printed as an appendix to this brief.

We think it will be helpful to a complete understanding of this case if a short history of this and similar State legislation is set forth here.

HISTORY OF LEGISLATION.

The outstanding features of the legislation on the authority of which the bonds were issued, and on the faith of which they were sold, consisted of express provision authorizing the prior fixing and levying of the installments of the assessment of benefits to be paid in each year during the life of the bond; that this levy should be a first lien on the respective tracts of land against which it was assessed; that the commissioners of the district could borrow money, issue bonds and execute a pledge and mortgage of the assessment of benefits; that the taxes should be collected by suit and not by administrative sale; and that should there be a default for thirty days in the payment of the bonds or coupons, any bondholder could apply to a court of equity for the appointment of a receiver to collect the delinquent installments of the assessment of benefits, or taxes, and pay the bonds.

These provisions were inserted in this act and in all similar legislation of the State of Arkansas for very good reasons. Amendment No. 1 to the Constitution of Arkansas, adopted in the year 1885, expressly prohibited the Legislature from making any appropriation or levying any tax to pay either principal or interest of certain State bonds described in the amendment. The natural result of the adoption of

this amendment was a loss of credit. To overcome this, succeeding Legislatures found it necessary to give unusual guaranties of good faith and effective securities that the courts could enforce, together with equitable remedies that would be adequate to compel payment. These inducements resulted in the ability of improvement districts in the State to borrow money and at a reasonable rate of interest. In various parts of the State levees were needed to protect certain lands from overflow; drainage systems were also needed to reclaim lands. Later, improved roads were required. The levees, drains and roads directly benefited certain lands, and the persistent policy of the State authorized and encouraged the creation of improvement districts for these several purposes; the districts embracing the lands deemed especially benefited by the improvement and against which special assessments would be levied to pay the cost.

These districts and their officers had no functions except to make the improvement and pay for it. They had no governmental powers.

A general law for the creation of levee districts was passed in the year 1889. It expressly provided that the lien of the assessments on the lands should be in the nature of a mortgage, which should be enforced by foreclosure. (Crawford & Moses' Digest of the Statutes of

Arkansas, Sec. 6731. Hereafter this Digest will be referred to by the abbreviations "C. & M. Dig.").

The operation of the General Levee Act did not secure the desired credit, because of the absence of express power in the directors of such districts to give a technical pledge and mortgage of the assessment of benefits to secure bonds, and the absence of express power in the court of equity to foreclose the mortgage lien and appoint receivers to collect the taxes in the event the commissioners and officers failed to do so promptly. Under that legislation, the levee districts could seldom borrow money on advantageous terms.

To meet the situation, and as a matter of inducement for the investment in the bonds of such districts, many special acts were passed creating levee districts, and containing provisions for the security of bondholders, which expressly provided for the making of a technical pledge and mortgage, the right of the bondholders or their representatives to resort to a court of equity, and the remedy of a receivership in the event of default.

The same inability to borrow money on advantageous terms existed under the provisions of the early drainage law, and various special acts of the Legislature were passed,

creating special assessment drainage districts, and authorizing the same security for the payment of bonds and the same remedies for the collection of taxes.

In 1909 a general law was passed providing for the creation of drainage and levee districts, in which there were complete provisions for the security of the holders of bonds. These provisions were express that all bonds issued should be secured by a lien on the lands in the district, and that in the event of default in the payment of a bond or coupon, any bondholder could apply to the chancery court for the appointment of a receiver to foreclose the lien on the assessment of benefits. (C. & M. Dig. Secs. 3623, 3638, 3633).

Many millions of dollars of bonds have been issued by levee and drainage districts in the State of Arkansas, and the proceeds used for that improvement work. Probably $50,000,000 of such bonds are now outstanding in the hands of innocent purchasers.

With the advent of the automobile, the growing demand for improved roads became more pressing, and in 1915 a general act was passed, providing for the organization and proceedings of road improvement districts. (C. & M. Dig. 5399-5462). This act contained complete provision for the security and prompt repay-

ment of borrowed money. It provided that bonds should be issued, that the annual installments of the assessment of benefits becoming due in future years should be levied at one time, and before the issue of the bonds, and should be a first lien on the respective tracts of land against which they were assessed; that for the payment of the principal and interest of bonds issued by the districts, the entire assessment of benefits might be pledged and mortgaged, and that if any bond or coupon was not promptly paid when due, a receiver should be appointed by the chancery court upon the application of any bondholder. (C. & M. Dig. 5432, 5433, 5443, 5478, 5481).

During the era of prosperity, which was at its height in the year 1919, cotton was selling at 65 cents a pound, rice at $3 a bushel, and other things in proportion. The number of automobiles increased amazingly, as did also the demand for good roads.

The general road improvement law of Arkansas, to which we have referred, involved much technical procedure and consequent delay. That law only provided for roads within a county, and it was frequently desirable to improve one crossing a county line. To save delay, avoid complications, and meet peculiar situations, the Legislature of Arkansas, beginning with the regular session

of 1917 and through the regular session of 1923, passed many special acts creating or providing for the creation of road improvement districts. They all followed the same policy as did the general law, and contained the same provisions for borrowing money with which to make the improvements, and issuing negotiable bonds, including provisions levying all the installments of the assessment of benefits in advance and at one time, making these levies first liens on the benefited lands, providing for the execution of a pledge and mortgage of the assessment of benefits to secure the bonds, and that in the event of default in the payment of any bond or coupon, resort might be had to the chancery court for the appointment of a receiver to collect the assessment of benefits and pay the bonds.

There was one very practical situation that made it necessary that these rural special assessment districts should offer extra inducements to investors, and that was that the districts had only territorial integrity. They were created solely for the purpose of making the improvement. Unlike a city, town, or county that had a community spirit, a history and a future to consider, these rural special assessmen t districts could not offer the valuable pledge of faith and credit that would attend bonds issued by municipalities. From a credit standpoint,

they had neither lineage to revere nor posterity to protect—they were created to make a certain improvement, and when this was done and paid for, they ceased to exist. *Williams* v. *City of Ft. Smith*, 263 S. W. (Ark.) p. 397. A pledge of faith and credit only by such fleeting entities was of no practical value to those seeking safe investments, and it was imperative that those districts give tangible security for the payment of their bonds and effective remedies for their enforcement.

In the year 1917 there were many special acts passed by the Legislature, creating road improvement districts, and in the year 1919 there were many more. In 1920 the Governor called a special session, limiting his call to special acts for road improvement districts. (A certified copy of this proclamation is filed with the clerk of this court). At the sessions of 1921 and 1923 many more of these special acts were passed. The amount of these levee drainage and road improvement district bonds now outstanding in the hands of innocent purchasers in various parts of the United States exceeds $100,000,000.

ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in holding that the district court was without jurisdiction to entertain the suit and appoint the receiver.

ARGUMENT.

REPEALING ACT VOID.

After the Legislature of Arkansas had created this district, authorized it to issue bonds, make assessment of the benefits and levy them all at one time, to be paid in succeeding annual installments, to execute a pledge and mortgage of this assessment of benefits, and had given the remedy of the appointment of a receiver by a court of equity in the event the interest or any of the bonds were not paid, at maturity, and after another act of the Legislature had confirmed the assessment of benefits made in the district and the plans for the improvement work, and after bonds had been issued on the faith of these acts and were in the hands of innocent purchasers for value, the Legislature, at its session in 1923, passed an act repealing the other acts, thus abolishing the district without making any provisions for the payment of the bonds.

The bondholders had contract rights in the assessment of benefits, the pledge and mortgage thereof, and the remedy by the appointment of a receiver by a court of equity. The repealing act attempted to destroy every contract obligation in favor of the bondholders, and to deprive them of every remedy for the

collection of their debts. Its every feature is in violation of the constitutional prohibition of the passage by the States of acts impairing the obligation of contracts.

Fletcher v. *Peake*, 6 Cranch 137.

Von Hoffman v. *City of Quincy*, 4 Wall. 535-554.

Wolff v. *New Orleans*, 130 U. S. 358.

Peake v. *New Orleans*, 139 U. S. 361.

Graham v. *Folsom*, 200 U. S. 248, 250, 252, 253.

Louisiana v. *New Orleans*, 102 U. S. 203-205.

In *Rees* v. *Watertown*, 19 Wall. 107, the opinion states:

> "A voluntary refusal to pay an honest debt is a high offense in a commercial community and is just cause of war between nations. * * * The remedies for collection of the debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. * * * All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other."

"Laws for the enforcement of a contract are a part of it," announced this court as early as *Von Hoffman* v. *Quincey*, 4 Wall. 550, 552.

In *Green* v. *Biddle*, 8 Wheaton 92, it is stated that it is no answer that the changed laws affect only the remedy.

The principle is well set forth in *Harrison* v. *Remington Paper Co.*, 140 Fed. 392 (C. C. A. 8th Circuit).

Of course, the right to the appointment of a receiver by a court of equity was a most valuable one to the bondholders, and was of the very essence of the obligation of the contract. The repealing act would not only destroy this right, but it would deprive the bondholders of every remedy. The district being destroyed, there is no corporate entity against which to maintain an action at law. If a receiver cannot be appointed to collect the assessments, the bondholders are absolutely without redress. Such a statute cannot be sustained as long as the Federal Constitution continues to exist.

In *Bronson* v. *Kinzie*, 1 Howard 316, it is said.

> "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is

immaterial whether it is procured by acting on the remedy or by acting directly on the contract itself. In either case, it is prohibited by the Constitution."

So, in *Graham* v. *Folsom*, 200 U. S. 248, this court held:

"The power of the State to alter or destroy its municipal corporations is not, so far as the impairment of the obligation clause of the Federal Constitution is concerned, greater than the power to repeal its legislation; and the alteration or destruction of subordinate governmental divisions is not the proper exercise of legislative power when it impairs the obligations of contracts previously entered into."

In that case, there were State officers to be mandamused, and it was ordered that the mandamus should issue against them. In this case, the abolition of the district puts an end to the powers of the commissioners. There is no one against whom a mandamus could issue, so that the remedy by the appointment of a receiver provided for in the statute is the only means of collecting the debt.

In *Wolff* v. *New Orleans*, 103 U. S. 358, it was held that a statute which took away from a city taxing powers which it possessed at the time it entered into the contract was unconstitutional.

In *Rawls County Court* v. *United States,* 105 U. S. 733, a county contracted indebtedness at a time when its taxing power was unlimited, and it was held that a statute subsequently passed limiting the amount of taxes that could be levied was void.

In the case at bar, by abolishing the district altogether, making no provisions for its bonds, the act of the Legislature, if sustained, will defeat their payment entirely.

THE SECURITY OFFERED THE BOND PURCHASER.

A greater showing of anxiety for credit and more solemn pledges as inducements therefor than those made by and for respondent district, and on the faith of which the bonds in suit were issued and sold to their present holders, could hardly be imagined.

The Legislature of the State of Arkansas, by unanimous vote in each house and solemn approval by the Governor, enacted the law creating this district for the purpose of making the improvement desired; provided that the commissioners named by the Legislature should form plans for the improvement and file them with a public officer; that they should then make their assessment of benefits and file it with the county clerk, and publish notice of this filing,

and of a date for a hearing on the assessment; and that at this hearing the commissioners should attend and equalize any assessments found unjust. Any property owner feeling aggrieved could then resort to the courts, within thirty more days, to attack the findings of benefits. The levies of the installments of the assessment of benefits were to be made in advance by the county court, and if any person felt aggrieved by this levy, he could appeal.

After this procedure was gone through with, the next Legislature, by unanimous vote in each of its houses, passed an act approving the plans made by the commissioners and confirming the assessment of benefits theretofore made in the district, and this act was duly approved by the Governor. After all this was done, the commissioners issued and sold the bonds in suit, giving the further security authorized by law of the pledge and mortgage of the assessment of benefits.

The Legislature of Arkansas held out as extra inducements for the purchase of these bonds that they should be secured by a lien on the lands in the district and by a pledge and mortgage of the assessment of benefits to be executed by the commissioners, and covenanted that in the event of default of the interest or the bonds, a court of equity should have juris-

diction of a suit on them, and in that suit could appoint a receiver.

Districts created under the Arkansas statutes differ from improvement districts usual in other States, in that the assessments are not collected by executive distraint, but by suit in equity. The installments are annually placed upon the county taxbooks; but if they are not paid, they are not included in the taxes for which the lands are sold, but are collected by suit brought by the district or its receiver. When the receiver is appointed he does not displace any executive machinery devised for the collection of the installments of the assessment of benefits; he merely brings the suit which should otherwise have been brought by the district.

Though for convenience called "taxes" in the Arkansas acts creating the districts, these local assessments, which are based on benefits to be received, are not taxes in the ordinary sense, but installments of the amount the land is enhanced in value. The distinction between them and ordinary taxes is pointed out by this court in *Illinois Central Railroad* v. *Decatur*, 147 U. S. 197, and by the Supreme Court of Arkansas in *Sanders* v. *Brown*, 65 Ark. 499; also in numerous other cases in both courts.

The statute provides that the commissioners may execute a mortgage and pledge of the assessment of benefits as security for the bonds. It makes no provision as to the form of the instrument. The bonds were payable to bearer and were intended to circulate in the markets of the world, like the bonds of railroads and other large corporations. In such cases, the only way in which a mortgage can be made is by a conveyance to a trustee to hold for the bondholders. Of course, a mortgage cannot be made to a body of bondholders who are continually changing as the bonds pass from hand to hand, and the intervention of a trustee is indispensable.

REASONING AND AUTHORITIES OF THE DECISION OF THE COURT OF APPEALS.

We respectfully urge that the opinion of the Court of Appeals and the cases cited therein show that the court erred in the application of the rules laid down by the cases on which it relies, and that those rules, when applied to this case, show jurisdiction of the district court to entertain the suit and to appoint the receiver.

The cases cited by the Court of Appeals as authority for its holding are the following:

Walkley v. *City of Muscatine*, 6 Wall 481.

Rees v. *City of Watertown*, 19 Wall 107.

Raton Waterworks v. *Raton*, 174 U. S. 360, 364.

Graham v. *Folsom*, 200 U. S. 248-253.

Thompson v. *Allen County*, 115 U. S. 550.

Heine v. *Levee Commissioners*, 19 Wall. 655.

Meriweather v. *Garrett*, 102 U. S. 472 (Extensively quoted from).

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.

Street Grading District v. *Hagadorn*, 186 Fed. 451.

In considering the application of these cases, it should be borne in mind that in this case there was a levy of the installments of the assessment of benefits, or taxes, made in advance for the full term necessary to pay the bonds, and made before the bonds were issued. There was express authority of law for the technical pledge and mortgage of the assessment of benefits, which was executed and recorded before the bonds were delivered. The taxes were to be enforced by a suit in chancery brought by the district. There were express provisions of the law for a suit in a court of

equity to foreclose the mortgage and for the appointment of a receiver if there was default in the payment of the bonds.

In *Walkley* v. *City of Muscatine,* 6 Wall. 481, there was a judgment at law on the bonds of a city, but no mandamus or other writ was issued thereon. Then there was the resort to equity which constituted that case. The court held the remedy by mandamus was complete.

In *Rees* v. *City of Watertown,* 19 Wall. 107, there was a judgment at law and a mandamus, which proved unavailing. The court held that equity could not take the litigation, as there was no technical ground to invoke its jurisdiction, saying that the remedy at law was not so inadequate as to justify jurisdiction in equity. The prayer of the bill in that case was that the property of the inhabitants of the city be charged with the debt, and that the court devise and levy a tax to pay it. This was an effort to apply rules similar to those that had been applied in some of the New England States. (Pp. 117, 119, 120).

In *Raton Waterworks* v. *Raton,* 174 U. S. 360, 364, there was no resort to a court of law, but a bill in equity for specific performance of an agreement to pay an ordinary debt.

In *Graham* v. *Folsom,* 200 U. S. 248, 253, the suit was at law, with no resort to equity;

and the court sustained a mandamus, holding that the payment of the debt could not be defeated by legislation dissolving the municipality.

In *Thompson* v. *Allen County,* 115 U. S., there was a judgment at law and a mandamus, which proved unavailing. The court held that inadequacy of the remedy at law was not of the kind to confer jurisdiction on equity.

The case of *Meriweather* v. *Garrett,* 102 U. S. 472, merits careful analysis, as it is the authority for the statement by the Court of Appeals that equity cannot appoint a receiver, even when a State statute authorizes a receivership.

In that case, it appeared that the city of Memphis, Tennessee, had become heavily indebted, and, apparently, after the creation of the debt there was an act of the Legislature of Tennessee providing that where any municipality was bankrupt in an amount exceeding $100,000, creditors could resort to a court of equity and have a receiver appointed, who should take over all of the property of the municipality, including fire stations, public buildings, and everything else that it held in trust for the inhabitants for the discharge of governmental functions. It will be noted that this legislation applied only where there was an existing municipality, and also that it was not

passed, evidently, until after the creation of the debts involved in suit. Creditors of the city of Memphis filed a bill in the United States District Court, invoking the provisions of the State law, and a receiver was appointed by that court. A few days after the appointment of this receiver, the Legislature passed other acts, one of which abolished the municipality of Memphis, and provided that a State officer, termed a "receiver and back tax collector," should be *appointed by the Governor* to collect its taxes and pay its indebtedness. This legislation removed the city of Memphis from the operation of the Act of 1877, as Memphis was no longer a municipality, and furthermore, the Act of 1877 authorizing the appointment of a receiver by a court of equity was passed after the creation of the debt sought to be enforced.

The conclusion announced by the majority opinion in that case expressly excludes from its operation taxes levied in obedience to the special requirement of contracts, as shown by the following quotation:

> "Taxes levied according to law before the repeal of the charter, *other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law*, and such as were levied under judicial direction for the payment

of judgments recovered against the city, cannot be collected through the instru mentalities of a court of chancery at the instance of creditors of the city. * * * Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the Legislature to perform that duty, is not decided, as the case does not require it" (P. 501).

Of course, the receiver to be appointed by the Governor to collect taxes was a "State officer," and, according to familiar rules, the Federal courts could not make an appointment to a State office.

In *Heine* v. *Levee Commissioners,* 19 Wall. 655, there was no suit at law, or showing that the process in one would be unavailing. There had been no ascertainment by the levee commissioners of the amount of taxes to be collected in succeeding years, or any levy of them. The remedy of specific performance was asked, but rejected by the court. Then it was sought to invoke the jurisdiction of equity to enforce liens; but the court replied to this argument that there had been no levy of taxes, and if there had been a levy, the statute did not make the taxes a lien. The opinion states (p. 660), as a

ground for its decision, that there was no jurisdiction in a court of equity founded on its recognized principles.

In *Street Grading District* v. *Hagadorn*, 186 Fed. 451, there was only the question whether the term "pledge" used in an act of the Legislature of Arkansas, which authorized special assessment improvement districts in cities to *pledge* their uncollected assessments, was used in a colloquial or technical sense, and the court held that the term "pledge" was used in the statute in its colloquial sense, as distinguished from its technical sense, and meant a pledge of faith and credit only, "since there could be no pledge without delivery and there could be no delivery of uncollected assessments." The term "mortgage" means the same thing colloquially and technically; and we submit that, had the terms of the statute under consideration in the Hagadorn case been "pledged and mortgaged," the opinion indicates that the court would have sustained the jurisdiction of equity. It is likely that the decision would have been different if the case of *Dale* v. *Pattison*, 234 U. S. 399, 406, had been rendered previously.

In none of these cases cited by the Court of Appeals as authority for its holding was there a situation like the one in this case. Here, there is provision in the law for a *pledge and mortgage*, and these terms can have no meaning

unless used in their technical sense. There is express provision in the State law conferring jurisdiction on a court of equity to entertain a suit on the bonds.

There can be no principle that will prevent a State Legislature from authorizing one of these districts to mortgage its assessment of benefits, or from conferring on a court of equity jurisdiction of a suit on the bonds to foreclose the mortgage and to appoint a receiver; particularly in view of the fact that the assessment of benefits is to be collected, not by executive process, but by a suit which can as well be brought by a receiver as by the district. The principle of all these cases, and of all others in this court, denying jurisdiction of equity to appoint a receiver, is based solely on the ground that a court of equity has no jurisdiction so to do under its recognized heads of jurisdiction or by statute. Even without the express provisions of the law authorizing a court of equity to appoint a receiver, it would have jurisdiction of a suit on the bonds to foreclose the pledge and mortgage, and one of its usual processes available in such cases is a receivership.

The court below held that the road district could not mortgage its assessment of benefits. As mortgages of intangible properties, like rents, profits and income, are of daily occur-

rence, the objection must lie in the fact that the district is a public corporation.

In the case of *Kenicott* v. *Supervisors*, 16 Wall. 452, the county of Wayne, in Illinois, was authorized to mortgage its swamp lands in aid of a railroad. This it did, and the bonds not being paid at maturity, a foreclosure suit was brought in the Federal court, and this court affirmed the right of the plaintiff to maintain the action, and remanded the case with directions to foreclose the mortgage. That case would seem to be conclusive.

A MORTGAGE OF INCOME TO BE REALIZED IN THE FUTURE IS VALID, ESPECIALLY WHERE AUTHORIZED BY STATUTE.

There is nothing novel in a pledge and mortgage of income to be provided from a particular source, or any source. In fact, a pledge and mortgage of income is quite appropriate where credit is sought and security is needed therefor. Wherever such instruments have been before the courts, they have been sustained as the parties intended they should be.

American Bridge Co. v. *Heidelbach*, 94 U. S. 798.

Galveston v. *Cowdrey*, 11 Wall. 483.

Atlantic Trust Co. v. *Dana*, 138 Fed. 209, 217 (C. C. A. 8th Cir.).

South Dakota v. North
a, 192 U.S. 286, a r
road stocks was enf

A mortgage on an unplanted crop is valid, when authorized by statute.

Jarrett v. *McDonald*, 32 Ark. 598.

A mortgage on the increase of animals is valid and enforceable.

Howell v. *Walker*, 111 Ark. 362.

There being a lien and a valid pledge and mortgage, equity has jurisdiction of the controversy.

Ober v. *Gallagher*, 93 U. S. 208.

Case v. *Beauregard*, 101 U. S. 688, 691.

Wymon v. *Wallace*, 201 U. S. 242.

Closser v. *Strawn*, 227 U. S. 242.

Clews v. *Jamieson*, 182 U. S. 461, 479.

Oelrichs v. *Spain*, 15 Wall. 211

George v. *Wallace*, 135 Fed. 286, 292.

Chicago Board of Trade v. *Johnson*, 264 U. S. 1.

While the courts are properly reluctant to interfere in matters of taxation by a State, there is no instance of a refusal to do so where the jurisdiction exists. For instance, there is jurisdiction at law to render judgment on money demands, and when invoked and the judgment is obtained, all processes available in a law court

will be exercised to collect the judgment, even though there is involved the levy and collection of taxes. Thus, the writ of mandamus is always awarded, where desired, to compel the tax officers to levy and collect a tax to pay the judgment rendered by the court issuing the writ.

In most cases before this court, where an effort has been made to invoke the jurisdiction of equity in suits by bondholders, the court has answered the argument seeking to sustain the jurisdiction that the remedy at law is complete, and there is nothing in the situation to invoke the jurisdiction of equity under any of its recognized heads.

Thus, in *Rees* v. *City of Watertown,* 19 Wall. 107, the court remarked:

> "Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we would be quite willing to give him the aid requested if the law permitted."

In *South Dakota* v. *North Carolina,* 192 U. S. 286, 321, a pledge by a State of stocks to secure State bonds was enforced by the courts.

THE UNITED STATES COURTS WILL ASSUME ALL JURISDICTION THAT THE STATE COURTS COULD ASSUME.

The provision of the act authorizing the appointment of a receiver by a court of equity is as plain as this:

> "If any bond or interest coupon on any bond issued by said board is not paid within thirty days after its maturity, it shall be the duty of the chancery court of Poinsett County, on application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the taxes aforesaid, and an assessor to reassess the benefits, if necessary; and the proceeds of such taxes and collections shall be applied, after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said board which are then due and payable; and the said receiver may be directed by suit to foreclose the lien of said taxes on said lands; and the suits so brought by the said receiver shall be conducted in all matters as suits by the board as hereinbefore provided, and with like effect; and the decrees and deeds therein shall have the same presumption in their favor" (Section 20).

In a case properly within its jurisdiction, the District Court of the United States is as much the "chancery court of Poinsett County" as is the State chancery court, and the jurisdiction is expressly conferred on the United States District Court by the act itself. Should this be disputed, a complete answer to any argument is that if the chancery court of Poinsett County may exercise jurisdiction, the District Court of the United States will exercise the same jurisdiction in a case properly before it.

The case of *Supervisors* v. *Rogers*, 7 Wall. 175, is in point. In that case there was a judgment at law against a county in Iowa, on which a writ of mandamus was issued. The Iowa Code provided that in proceedings on mandamus, if the writ was disobeyed, the court might appoint "some other person to execute it." The United States court applied the same remedy that would be applied in the State court, and appointed its marshal as commissioner to execute the writ. The commissioner appointed by the court was the equivalent of the receiver here. This action of the lower court was approved, this court saying, p. 180:

> "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment.
>
> "This depends upon a provision of the Code of the State of Iowa. The provision is

found in a chapter regulating proceedings in the writ of mandamus; and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, fine and imprisonment. It is given by way of an alternative proceeding in execution of the peremptory writ in lieu of the attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the Legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State, and the peremptory mandate of the court.

"This section is but a modification of the law of England and of the New England States, which provides for the execution of a judgment recovered against a county, city or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people.

> "It is said that this practice prescribed for the State courts of Iowa has not been adopted by the United States circuit for that district, and hence that it is not competent for the court in the present instance to follow this mode of proceeding. But the answer is that the court having charge of the cause, under the act of 1839, is fully competent to adopt it in the particular case, as its power is the same over it as if it had been a suit originally brought in the court."

This holding was carefully analyzed and explained in *Preston* v. *Sturgis Milling Co.*, 183 Fed. 1, 5, (C. C. A. 6th Cir.).

In *St. Louis S. W. Railway Co.* v. *Road Improvement District No. 2 of Lafayette County*, 257 U. S. 547, this court held that the proceedings of the county court in the hearing on the assessment of benefits was judicial, and could be removed to the United States court, and the same remedies applied as would have been applied in the State court.

In *Davis* v. *Gray*, 16 Wall. 221, this court says:

> "A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitu-

tion gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights."

That rule has been applied in many cases, of which we note the following:

Suydam v. *Broadnax*, 14 Peters 75.

Union Bank of Tennessee v. *Jolly*, 18 Howard, 504, 507.

Cowles v. *Mercer County*, 7 Wall. 118, 122.

Ex Parte McNeil, 13 Wall. 243.

Case of Broderick's Will, 21 Wall. 520.

Cummings v. *National Bank*, 101 U. S. 157.

Holland v. *Challen*, 110 U. S. 24.

Hess v. *Reynolds*, 113 U. S. 77.

Gormley v. *Clark*, 134 U. S. 348.

Lawrence v. *Nelson*, 143 U. S. 215.

Chicot County v. *Sherwood*, 148 U. S. 532, 533.

Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 391.

Crowley v. *Northern Pac. R. R. Co.*, 159 U. S. 582.

Smyth v. *Ames*, 169 U. S. 516.

Greeley v. *Lowe*, 155 U. S. 58, 75.

U. S. v. *Wilson*, 118 U. S. 86, 89.

Norwood v. *Baker*, 172 U. S. 292.

Farrell v. *O'Brien*, 199 U. S. 111.

Sutton v. *English*, 246 U. S. 205.

Tennessee Coal Co. v. *George*, 233 U. S. 345.

Spokane Inland R. R. v. *Whitley*, 237 U. S. 494.

Missouri, K. & T. Trust Co. v. *Krumseig*, 172 U. S. 351.

Dawson v. Kentucky Distilleries Co., 255 U. S. 296.

St. L. S. W. Ry. Co. v. *Comm'rs Road Imp. Dist. No. 2 of Lafayette County*, 257 U. S. 547.

There is the same division of powers among the departments of government under the Constitution of Arkansas as was noticed by this court to exist under the Constitution of Michi-

gan in *Detroit etc. Railway Co.* v. *Michigan Ry. Commission,* 235 U. S. 402, 404; and the jurisdiction conferred on the chancery court to entertain the suit on the bonds and appoint the receiver, in its essence and under the Constitution of Arkansas, was strictly and only a judicial proceeding.

The case of *Stansell* v. *Levee Board of Mississippi District No. 1,* 13 Fed. 846, was decided by a district judge. The opinion is a full one, and its reasoning is so persuasive that it is worthy of quotation.

In that case, the levee district was created, and a certain tax per acre was provided for, to be collected annually for twelve years. The statute creating the district (page 848) provided that in default of payment of any indebtedness of the district the court might appoint special commissioners to collect the taxes and pay the debts.

A default having occurred in the payment of the bonds, the court held that the United States District Court had power to appoint a commissioner, who was the exact equivalent of the receiver provided for in the statute now before the court, to collect the taxes. The court concludes its opinion on the question of jurisdiction with the following language (page 851):

"The levy was made by the Legislature in the act of incorporation, and it was further provided that it should not be repealed until all the charges and obligations were paid and discharged. The same legislative act gave any holder of a past-due obligation upon the fund made a charge upon the lands embraced within the levee district, this summary remedy for its collection. That this remedy could be enforced by the judges and officers of the State mentioned is not denied. Such being the case, this court has the power to adopt the same remedies in favor of a nonresident creditor who has obtained a decree against a resident defendant."

The case of *Campbellsville Lumber Co.* v. *Hubbert,* 112 Fed. 718, was decided by the Circuit Court of Appeals of the Sixth Circuit, and by Judges Lurton and Day, afterwards justices of this court. In that case, it appeared (page 719) that the original Kentucky statute of March 18, 1878, provided that "the county was authorized to issue new bonds in settlement and compromise of its existing indebtedness on terms therein named; and such act provided that, if the county should refuse to levy and collect a tax to pay any judgment upon the compromise bonds or coupons, after due notice and demand, it should be the duty of the 'circuit court,' or, in vacation,

of the 'circuit judge of the Seventh judicial circuit,' to make an order based on the last preceding assessment, 'levying a tax and appointing a collector, whose duty it shall be to collect from the taxpayers of Taylor County sufficient to pay off such judgment,' etc."

In respect to this statute, Judge Lurton, delivering the unanimous opinion of the court, said (page 721):

> "1. For the purposes of this case, we may assume that the Legislature of Kentucky did not exceed its constitutional powers in providing the very stringent remedies found in the act approved March 18, 1878, and the law amending that act approved February 27, 1882. The power to impose a tax or raise money by general assessment for a public purpose is a very high attribute of sovereignty, and can only be exercised when authorized by express legislative authority. *Supervisors* v. *Rogers,* 7 Wall. 175, 19 L. Ed. 162; *Rees* v. *City of Watertown,* 19 Wall. 107, 116, 22 L. Ed. 72; *Heine* v. *Levee Com'rs,* 19 Wall. 655, 22 L. Ed. 223; *Thompson* v. *Allen Co.,* 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472; *McLean Co. Precinct* v. *Deposit Bank of Owensboro,* 81 Ky. 254; *Grand Rapids School Furniture Co.* v. *Trustees of School District No. 29,* 102 Ky. 556, 44 S. W. 98. Even the power to

appoint a collector to collect a tax lawfully assessed does not exist in a court unless expressly authorized by legislative authority. *Thompson* v. *Allen Co.*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472. Nevertheless, when the Legislature has deputed to a court the power, in given circumstances, to levy and collect a tax for the satisfaction of a judgment rendered by that court, the power has been exercised without question. *Stansell* v. *Levee Board* (D. C.) 13 Fed. 846; *Supervisors* v. *Rogers*, 7 Wall. 175, 19 L. Ed 162. In the cases cited above the power was exercised by a Federal court by virtue of a State statute, as a remedy which followed the debt, and which might be enforced by a United States court in a case where Federal jurisdiction otherwise existed."

The court further held that, as the bonds were issued under the statute of 1878, the holders thereof were not entitled to certain other rights granted to the holders of bonds issued under the statute of 1882.

An appeal was prosecuted to this court, and the decision was affirmed.

This court discussed only the rights under the act of 1882, evidently considering the rights of the plaintiff under the statute of 1878 too plain to require discussion.

THE RIGHT TO A RECEIVERSHIP IS A SUBSTANTIVE RIGHT.

The question is whether the statute creates a substantive right, or whether it deals merely with a remedy. If a substantive right is given, it will be enforced in the Federal courts, according to the practice established in those tribunals. If only a remedy is given, unknown to Federal jurisdiction, that remedy must be sought in the State courts.

It seems to us exceedingly plain that in this case a substantive right was by the statute creating the district conferred upon the bondholders. The statute authorizes a pledge and mortgage of the assessment of benefits. That assessment was a first lien upon the real property in the district, and is as much the subject of assignment as a lien created by an ordinary mortgage or deed of trust.

That intangible things, such as rents, profits and future acquisitions, may be the subject of mortgage and pledge, has been established by so many decisions of this and other courts that it is now a mere truism in the law.

Along with every mortgage there goes the right to the appointment of a receiver, where that course is essential to the protection of the mortgagee's interests. An improvement district is merely a creature of the Legislature, and

the Legislature can impose upon it such liabilities as it deems fit. The Legislature has provided that so long as there is no default in the payment of the bonds, the property owners shall have a right to pay their taxes through the county collector. It has provided also that in case of such default the taxes shall be collected by a receiver appointed by the courts on the application of the bondholders. That this right to the appointment of a receiver is a substantive one of the greatest value must be apparent to this court, from its long and painful experience in matters of mandamuses against public corporations. If the inhabitants of a district are unwilling to pay their taxes, the commissioners are apt to resign and to interpose all manner of obstacles to their collection. Even where the collection is to be made by an administrative officer, the remedy by mandamus is, at best, unsatisfactory; but in a case like this, where the assessment of benefits is to be collected by judicial proceedings, a mandamus presents no remedy whatever. All that a mandamus could do would be to direct the commissioners to bring suit for the collection of the assessments. Over the conduct of this suit the commissioners, their attorneys and the State courts would have absolute control. The commissioners could employ attorneys who would be dilatory and inefficient, failing to make the

necessary proof, so that judgment would be improperly rendered in favor of the property owner, or the litigation might be indefinitely prolonged. The State courts, whose judges are usually elected, are apt to sympathize with the property owner, and will not force him to pay unpopular taxes, if there is any way to avoid it by delays or unfavorable decisions. It is safe to say that in this district, where its officers have misapplied the greater part of the funds derived from the sale of the bonds, and the road has become unpopular, and where the State chancellor has already decided against the validity of the district on grounds which this court must esteem worse than frivolous, a mandamus would be absolutely ineffective.

Very different would be the case when a receiver was appointed by the Federal court. That receiver would bring in the same court an ancillary suit for the collection of the assessments, and the assessments would be promptly paid or the delinquent lands would be sold. To take away the receivership and substitute in its place a mandamus would be to give to the bondholders a stone where bread has been promised.

By the terms of the statute creating the district, the bondholders were solemnly assured that if there should be default for thirty days in the payment either of principal or interest of the bonds a receiver would be appointed. It was

Equity has jurisdiction unless the remedy at law is equally efficient. Walla Walla v. Water

upon the faith of this assurance that they bought the bonds. The law under which an obligation is issued enters into it and forms a part thereof, as completely as if fully set forth therein. In every one of these bonds there is to be read a contract that in case the district defaults for thirty days in the payment of a bond or any coupon thereto attached, the holder shall be entitled to the appointment of a receiver to collect the assessment of benefits. It seems to us that it would be monstrous to hold that this solemn promise held out to the bondholders as an inducement to buy the bonds did not confer upon them a substantive right which will be enforced by the Federal courts.

This is particularly the case, because the appointment of a receiver in a suit to foreclose a mortgage lien is a part of the ordinary equity jurisdiction of the Federal courts; so that there is no attempt in the State statute to grant a remedy unknown to those courts, but merely to create a right which those courts will enforce in the manner provided by their rules and the practice in chancery.

What are substantial remedial rights is illustrated by numerous decisions of this court.

Thus in *Holland* v. *Challen*, 110 U. S. 15, it was held that a Nebraska statute which authorized the maintenance of a bill to quiet title to

lands not in possession of any one conferred a substantive right which would be enforced by equitable proceedings in the Federal courts.

A similar statute in California was held, in *Devine* v. *Los Angeles,* 202 U. S. 333, to give a right of action in the United States court of equity.

In *The Case of Broderick's Will,* 21 Wallace 503, 519, a statute of California authorized the chancery courts to set aside a forged will or one obtained by fraud or undue influence, and Mr. Justice Bradley, delivering the opinion of the court, said that this was an enlargement of equitable rights, and would be enforced in the Federal court. To the same effect are *Ellis* v. *Davis,* 109 U. S. 485; *Farrill* v. *O'Brien,* 199 U. S. 89, 110; *Sutton* v. *English,* 246 U. S. 199. 205.

In *Gormley* v. *Clark,* 134 U. S., 338 an Illinois statute authorized a suit in equity to establish title where records had been burned, and this court held that there was thereby created a substantive right which would be enforced in chancery in the Federal court.

It has always been the rule in the Federal courts, in accordance with the general equitable doctrine, that a suit cannot be maintained to remove a cloud on a title caused by a deed void upon its face; but in *Louisville & Nashville Ry. Co.* v. *Western Union Telegraph Company,* 234

U. S. 370, where a statute of Mississippi provided that a suit might be maintained in equity to remove a cloud cast by a deed void on its face, this court held that a substantive right was created which the courts of the United States would enforce.

In that case, this court says (234 U. S. 376):

> "There are many State statutes of this type (providing for equitable remedies not previously existing), and our decisions show that their enforcement in the Federal courts is subject to but three restrictions: 1. The case must be within the general class over which those courts are given jurisdiction. 2. A suit in equity does not lie in those courts where there is a plain, adequate and complete remedy at law. 3. In those courts there can be no commingling of legal and equitable remedies, or substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is defeated."

It will be seen that this suit is one which, under those restrictions, is tenable in the Federal courts, because: 1. The case is one of the class over which those courts are given jurisdiction, being a suit for the foreclosure of a mortgage, and the appointment of a receiver. 2. There is, in this case, no remedy whatever at

law since the abolition of the district, and before its abolition the remedy at law was so far from adequate as to be derisory. 3. There is here no commingling of legal and equitable remedies, and no substitution of the latter for the former, since courts of law have never had jurisdiction to foreclose a mortgage or appoint a receiver.

The same rule was laid down in *Reynolds* v. *Crawfordsville First National Bank*, 112 U. S. 405.

In *United States Mining Co.* v. *Lawson*, 134 Fed. 769, in an opinion delivered by then Circuit Judge, now Associate Justice, Van Devanter, it was held that a substantive right was conferred by a statute authorizing suit to be brought to quiet title by one not in possession, and this decision was affirmed in 207 U. S. 1, where the question was expressly passed upon.

In *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, cited by the Court of Appeals, where it was held that a State statute authorizing the appointment of a receiver of an insolvent corporation at the suit of any creditor would not apply in the Federal courts, the court was careful to say, on page 498:

> "Hanssen's contention is that the statute does not enlarge the equitable jurisdiction or remedies; and that it confers upon creditors of a Delaware corporation, if the

company is insolvent, a substantive equitable right to have a receiver appointed. If this were true, the right conferred could be enforced in the Federal courts, *Scott* v. *Neely*, 140 U. S. 106, 109; since the proceeding is in pleading and practice conformable to those commonly entertained by a court of equity."

This case comes exactly within the principle of the exception there laid down. Here, a mortgage of the assessment of benefits was authorized and express provision was made for the appointment of a receiver to enforce this mortgage, and it was upon the faith of those provisions that the bonds were purchased.

In *Butz* v. *City of Muscatine*, 8 Wall. 575, 583, it is said:

"The Act of 1852 and the provisions of the Code were in force at that time, and entered into and formed a part of the contract of the parties. They prescribed one of the remedies to which the bondholders were entitled in the event of default by the city. It has been uniformly held by this court that such remedies are within the protection of the Constitution of the United States, and that any State law which substantially impairs them is as much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract.

> If the remedy be taken away the contract is in effect annulled. Nothing is left of it, of any value to the party whose rights are thus invaded. This subject was fully considered in *Van Hoffman* v. *The City of Quincy*, 4 Wall. 557."

In *Bronson* v. *Kinzie*, 1 Howard 311, *Howard* v. *Bugbee*, 24 Howard 461, *Bowitz* v. *Beverly*, 163 U. S. 118, and many other cases, this court has held that the owner of a mortgage has a right to the remedies existing at the time of its execution, and that a statute which grants a right of redemption not then existing impairs this right, and is unconstitutional.

A familiar instance of equitable rights created by State statutes, which will be enforced in the Federal courts, is found in the case of mechanics' liens. Statutes on the subject usually provide that a mechanic or materialman who has done work or furnished material, and who brings suit for recovery of his demand within a limited time, shall be entitled to a lien upon the property improved. These statutes have been held by this court to create substantive rights which will be enforced in the Federal courts in equity, although no such right existed in the court of chancery in England at the time of the adoption of our Constitution.

Sheffield v. *Witherow*, 149 U. S. 574.

In *Kennicott* v. *Supervisors,* 16 Wall. 452, it was held that where a county was authorized to mortgage its swamp lands, that mortgage could be foreclosed in the Federal courts.

RECEIVERSHIP SANCTIONED BY ARKANSAS DECISIONS.

The jurisdiction of a court of equity to entertain a suit and appoint a receiver under statutes similar to this, but not as strong in favor of the bondholders, was sustained by the Supreme Court of Arkansas in *Hoehler* v. *Worthen,* 154 Ark. 444; *Thibault* v. *McHaney,* 109 Ark. 188, and *Same* v. *Same,* 127 Ark. 1; *Missouri Pacific Rd.* v. *Walnut Ridge & Alicia Road Imp. Dist.,* 160 Ark. 297; and by the Circuit Court of Appeals for the Eighth Circuit, Judges Sanborn and Munger presiding, in *State Bank of Wellston* v. *Mississippi Valley Trust Co.,* 297 Fed. Rep. 563, and by the Supreme Court of Georgia in *McVeigh* v. *McWilliams* (Ga.) 121 S. E. 641.

In none of these cases was any question raised by counsel or court as to the complete jurisdiction of a court of equity to entertain the suit of the bondholders and to appoint the receiver. But even if not raised, it being jurisdictional, it was the duty of the court to notice it. The district courts for both the Eastern and the Western Districts of Arkansas have had several occasions to pass upon similar acts

providing for the pledge and mortgage of assessments of benefits and the appointment of receivers; and in all instances these courts have entertained jurisdiction and made the appointment.

In *Arkansas Foundry Co.* v. *Stanley*, 150 Ark. 128, under a statute set out on page 133, and which is identical with the statute now before the court for construction, the Supreme Court of Arkansas held:

> "Under Special Acts 1919, p. 74, authorizing the commissioners of a bridge district to sell bonds at not less than par and to pay interest at not more than 6 per cent. and to pledge the assessments as security, such commissioners are authorized to borrow money from banks at the prescribed rate and pledge the assessments therefor."

Its last expression is found in *Howard-Sevier Road Improvement District No. 1* v. *Hunt*, decided on the 27th of October, 1924, and appearing in the Arkansas Law Reporter, Vol. 19, p. 277, but which had not reached the Southwestern Reporter at the time of the printing of this brief.

In that case, a decree foreclosing the mortgage given to secure the bonds of the district had been entered by the United States Court. The Supreme Court of Arkansas said, p. 286:

> "The judgment of the United States

District Court, after setting out the bonds, recited: They are 'the valid obligations of said district, and are each duly secured by a first mortgage on the assessment of benefits of said district, bearing even date to the bond issue, and duly recorded.' The judgment in that case was duly pleaded and in evidence in these consolidated causes. It was the duty of the trial court to give full faith and credit to this judgment."

In *Missouri Pacific Railroad Co.* v. *Sears*, 19 Ark. Law Reporter 309, decided on November 3, 1924, and not yet appearing in the Southwestern Reporter, the Supreme Court of Arkansas sustained and enforced the following statute:

"Section 25. In case, for any reason, the improvement contemplated by this district is not made, the preliminary expenses shall be a first lien upon all the property in the district, and shall be paid by a levy of a tax upon the assessed value for county and State taxation, which levy shall be made by the chancery court of Fulton and Izard counties, and *shall be collected by the receiver to be appointed by said court.*"

As the Supreme Court of Arkansas has recognized the validity of statutes providing for the appointment of receivers of improvement districts, we are at a loss to understand on what grounds the Circuit Court of Appeals could

overrule these decisions. If the Supreme Court of Arkansas gives effect to statutes providing for the appointment of receivers of Arkansas improvement districts, it is impossible to see why other courts should deem such an appointment a usurpation of jurisdiction.

Respectfully submitted,

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APPENDIX.

The material portions of the act creating this district are as follows (Ark. Road Acts of 1919, Vol 2, p. 1413):

Section 4. It is made the duty of said commissioners to proceed as rapidly as possible with the improvement of the road hereinbefore described, improving it in such manner as they deem to the best interests of the property owners, and they shall also maintain said road in good condition after its completion. As soon as possible, the commissioners of said district shall form their plans for the improvement, with the aid of the State Highway Department and of such engineers as they see fit to employ, and shall file the same with the county clerk of Poinsett County, along with specifications and an estimate of the cost. If said commissioners deem it to the best interest of the district to vary the line of the road, as hereinbefore laid out, they may report that fact to the county court of Poinsett County, and in that event, if the county court approves of the report, it may make an order changing the route of the road, and if necessary it shall, in that event, lay out the new road in the manner hereinafter provided.

Section 5. Said commissioners shall proceed to assess the land within the district, and shall inscribe in a book each tract of land, and

shall assess the value of the benefits to accrue to each tract by reason of such assessment, and shall enter such assessment of benefits opposite the description, together with the estimate of the probable cost to the landowner. Their assessment shall embrace not merely the lands, but all railroads, tramroads, telegraph, telephone and pipe lines, and other improvements on real estate that will be benefited by the improving of the road; and wherever the word "lands" is used in this act, it shall be construed to embrace all property subject to taxation herein. The assessors shall place opposite each tract the name of the supposed owner, as shown by the last county assessment list. The commissioners shall also assess all damages that will accrue to any landowner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such damages as to any tract of land, it shall be deemed a finding by them that no damages will be sustained.

Section 7. The assessment of benefits of said district shall be filed with the county clerk of Poinsett County, and the secretary of the board shall thereupon give notice of its filing by publication for two weeks in a newspaper published and having a bona fide circulation in that county. This notice may be in the following form:

ROAD IMPROVEMENT DISTRICT NUMBER 7 OF POINSETT COUNTY.

Notice is hereby given that the assessment of benefits and damages of the above district has been filed in the office of the county clerk of Poinsett County, where it is open to inspection. The following lands, not in the district as originally laid out, have been assessed for the improvement."

(Here will follow description of the lands beyond the borders of the district which have been assessed).

All persons wishing to be heard on said assessment will be heard by the commissioners of said district at the county court room at Harrisburg, in Poinsett County, on the ___ day of _____, 19____.

_____

Secretary.

On the day named in said notice, it will be the duty of the commissioners to meet at the placed named, and to hear all complaints against said assessment, and to equalize and adjust the same, and their determination shall be final, unless suit is brought in the chancery court of the county where the lands lie within thirty days thereafter to set aside their finding.

Section 9. The county court shall, at the time that the assessment of benefits is filed, or at any time subsequent, enter upon its record an order, which shall have all the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement, with ten per cent added for unforeseen contingencies, which tax is to be paid by the real property in the district in the proportion to the amount of the assessment of benefits thereon, and which is to be paid in annual installments, payable not to exceed ten per cent for any one year, as provided in such order. The tax so levied shall be a lien upon all the real property in the district from the time that the same is levied, and shall be entitled to preference over all demands, executions, incumbrances or liens whensoever created, and shall continue until such assessment, with any penalty and costs that may accrue thereon, shall have been paid. The remedy against such levy of taxes shall be by appeal, and such appeal must be taken and perfected within twenty days from the time that said levy has been made, and on such appeal the presumption shall be in favor of the legality of the tax.

Section 13. All taxes levid under the terms of this act shall be payable between the first Monday in January and the tenth day of

April of each year; and if any taxes levied by the board in pursuance of this act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in the chancery court of Poinsett County in the manner provided by sections 23 and 24 of Act No. 279 of the General Assembly of the State of Arkansas of the year 1909, entitled, "An Act to provide for the creation of drainage districts in this State," approved May 27, 1909; but the owner of property sold for taxes thereunder shall have the right to redeem it at any time within two years from the time his lands have been stricken off by the commissioner making the sale.

Section 17. In order to do the work, the board may borrow money at a rate of interest not exceeding six per cent per annum, may issue negotiable bonds therefor, signed by the members of the board, and may pledge and mortgage all assessments for the repayment thereof.

Section 20. All bonds issued by the commissioners, under the terms of this act, shall be secured by a lien on all lands, railroads and

tramroads in the district, and the board of commissioners shall see to it that a tax is levied annually, and collected under the provisions of this act, so long as it may be necessary to pay any bond issued or obligation contracted under its authority; and the making of said assessment or levy and collection may be enforced by mandamus.

If any bond or interest coupon on any bond issued by said board is not paid within thirty days after its maturity, it shall be the duty of the chancery court of Poinsett County, on application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the taxes aforesaid, and an assessor to reassess the benefits, if necessary; and the proceeds of such taxes and collections shall be applied, after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said board which are then due and payable; and the said receiver may be directed by suit to foreclose the lien of said taxes on said lands; and the suits so brought by the said receiver shall be conducted in all matters as suits by the board as hereinbefore provided, and with like effect; and the decrees and deeds therein shall have the same presumptions in their favor.

Sections 23 and 24 of the drainage act of 1909, referred to in section 13 of the act creat-

ing this district, are as follows (Ark. Acts of 1909, p. 844):

Section 23. All taxes levied under the terms of this act shall be payable between the first Monday in January and the 10th day of April of each year; and if any taxes levied by the county court in pursuance to this act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of 25 per cent; and said board of commissioners shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated, having chancery jurisdiction; and said court shall give judgment against said lands, railroads or tramroads for the amount of such taxes and said penalty of 25 per cent and interest on same, from the end of said sixty days allowed for the collection thereof, at the rate of six per cent per annum and all costs of the proceedings. Such judgment shall provide for the sale of said delinquent lands for cash, by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of said lands be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly

against such lands, and not against any other property or estate of said defendant. All or any part of said delinquent lands, railroads or tramroads for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid; and notice of the pendency of such suit shall be given by publication weekly for four weeks before judgment is entered, for the sale of said lands, railroads or tramroads, in some newspaper published in the county where such suits may be pending, which public notice may be in the following terms:

Board of Commissioners.....Drainage District,

v.

Delinquent Lands.

All persons having or claiming an interest in any of the following described lands are hereby notified that suit is pending in the chancery court of..... County, Arkansas, to enforce the collection of certain drainage taxes on the subjoined list of lands, each supposed owner having been set opposite his or her or its lands, together with the amounts severally due from each, to-wit:

(Then shall follow a list of supposed owners, with a descriptive list of said deliquent lands, and amounts due thereon respectively as aforesaid), and said public notice may conclude in the following form:

All persons and corporations interested in said lands are hereby notified that they are required by law to appear within four weeks and make defense to said suit, or the same will be taken for confessed and final judgment will be entered directing the sale of said lands for the purpose of collecting said taxes, together with the payment of interest, penalty and costs allowed by law.

.....

Clerk of said Court.

And said suit shall stand for trial at the first term of court after the complaint may be filed, if said four weeks shall expire either before the first day of the term or during the term of court to which said suits are brought, respectively, unless a continuance be granted for good cause shown, within the discretion of the court; and such continuance, for good cause shown, may be granted as to a part of said lands or defendants, without affecting the duty of the court to dispose finally of the others as to whom no continuance may be granted, and in all cases where notice has been properly given as aforesaid, and where no answer has been filed, or, if filed, and the cause decided for the plaintiff, the court by its decree shall grant the relief as prayed for in the complaint, and shall direct said commissioner to sell the lands, railroads and tramroads described in the complaint at the courthouse

door of the county wherein the decree is entered, at public outcry, to the highest and best bidder for cash in hand, after having first advertised such sales (such advertisement may include all the lands described in the decree) weekly for two weeks consecutively, in some newspaper published in the county, if there be one, and if no newspaper, then that such advertisement be published in some newspaper in an adjoining county; and if all the lands, railroads and tramroads be not sold on the day as advertised, such sale shall continue from day to day until completed; and said commissioner shall by proper deeds convey to the purchaser the lands, railroads and tramroads so sold, and the title to said lands, railroads and tramroads shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and to insane persons having no guardian or curators the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed.

In all suits brought under this section a reasonable attorney's fee shall be taxed in favor of the attorney for the plaintiff, which fee shall be added to the amount of the costs.

In case the commissioners shall fail to commence suit within sixty days after the taxes become delinquent, the holder of any bond issued by the district shall have the right to bring

suit for the collection of the delinquent assessments, and the proceedings in such a suit brought by the bondholders shall in all respects be governed by the provisions applicable to suits by the commissioners.

Section 24. Said suits shall be conducted in the name of such drainage district, and in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided, and neither attorneys *ad litem* nor guardians *ad litem,* nor any of the provisions of section 6254 of Kirby's Digest of Statutes of Arkansas, shall be required; and said suits may be disposed of on oral testimony, as in ordinary suits at law; and this law shall be liberally construed to give said assessment and tax lists the effect of bona fide mortgage for a valuable consideration, and a first lien upon said lands, railroads and tramroads, as against all persons having an interest therein. In such suits it shall be sufficient to allege generally and briefly the organization of the district and the nonpayment of the taxes, setting forth the description of the lands proceeded against, and the amount chargeable to each tract, with prayer for foreclosure. *Provided,* that no informality or irregularity in holding any of the meetings provided for herein, or valuation or assessment of the lands, or in the name of the owners, or the number of acres therein, shall

be a valid defense to such action. *Provided,* that in any case where the lands, railroads and tramroads are offered for sale by said commissioner, as provided by this Act, and the sum of the tax due, together with interest, costs and penalty, is not bid for the same, that said commissioner shall bid the same off in the name of the said board of directors of such drainage district, bidding therefor the whole amount due as aforesaid, and shall execute his deed therefor, as in other cases under this Act, conveying such land to such drainage board, and such deeds, when duly executed, in conformity to the provisions of this Act, and recorded, shall be received as evidence in all cases, showing an indefeasible title in said purchasers, unassailable in either law or equity.

Provided, that at any time within two years after the rendition of the final decree of the chancery court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of taxes on the said lands for the year for which they were sold, and upon the establishment of that fact, the court shall vacate and set aside that decree, and *provided,* that any landowner shall have the right to redeem any and all lands sold at such sale within one year thereafter; which shall run from the day when the lands are offered for sale, and not from the day when the sale is confirmed.

ACT NUMBER 45.

An Act to amend Act No. 322 of the Acts of the General Assembly of the State of Arkansas of the year 1919, entitled 'An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas' and to confirm the assessment of benefits in said road improvement district.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. That section 1 of Act No. 322 of the Acts of the General Assembly of the State of Arkansas of the year 1919, entitled "An Act to created Road Improvement District No. 7 of Poinsett County, Arkansas," approved March 21, 1919, be amended so as to real as follows:

"An Improvement District, to be known as Road Improvement District No. 7 of Poinsett County, is hereby organized for the purpose of improving the following road, making it a hard surface road:

"A road beginning at the northeast corner of section 36, in township 11 north of the base line, and in range 5 east, thence running south on the range line to a point 400 feet north of the southeast corner of section 25, in township 10 north of the base line and range 5 east, thence running parallel with and adjacent to the right

bank of the St. Francis River to the north and south quarter line of section 36, township 10 north and range 5 east; thence south to the line between Poinsett and Cross counties, thence west to the southwest corner of section 36, township 10 north and range 5 east. Said district shall consist of the following territory in Poinsett County:

"In township 11 north, range 6 east, sections 31, 32 and 33.

"In township 11 north, range 5 east, sections 34, 35 and 36.

"In township 10 north, range 6 east, sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32 and 33.

"In township 10 north, range 5 east, sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36.

"And shall include all towns within said territory."

"Section 2. It is ascertained and hereby declared that the assessment of benefits in Road Improvement District No. 7 of Poinsett County, Arkansas, have been made upon the lands and property described in section hereof, and that each of them, as they appear on the benefit assessment book for said district, now on file

with the county clerk of Poinsett County, Arkansas, are just, equitable and proportionate as applied to the improvement authorized to be made by the commissioners of said district; and said assessment is hereby confirmed and established as the assessment of benefits of said Road Improvement District Number 7 of Poinsett County, Arkansas, until the same has been revised in the manner provided by section 8 of Act No. 322 of the Acts of the General Assembly of the State of Arkansas of the year 1919, entitled "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas."

"Section 3. The plans for the construction of said road heretofore filed by the commissioners of said road district and all the acts and proceedings of the board of commissioners for said district are hereby confirmed and approved.

"Section 4. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and it shall take effect and be in force immediately after its passage.

"Approved: February 4, 1920.

ACT 624.

An Act to repeal Act No. 322 of the General Assembly of the State of Arkansas for the year 1919, entitled: "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas," approved March 21, 1919, and to repeal Act No. 45 of the Extraordinary Session of the General Assembly of the State of Arkansas for the year 1920, entitled: "An Act to amend Act No. 322 of the General Assembly of the State of Arkansas for the year 1919," approved February 4, 1920, and for other purposes.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. That Act No. 322 of the General Assembly of the State of Arkansas for the year 1919, entitled: "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas," approved March 21, 1919, and also Act No. 45 of the Extraordinary Session of the General Assembly of the State of Arkansas for the year 1920, entitled: "An Act to amend Act No. 322 of the General Assembly of the State of Arkansas for the year 1919," entitled: "An Act to create Road Improvement District No. 7 of Poinsett County, Arkansas, and to confirm the assessment of benefits in said improvement district," approved February 4, 1920, be and each of them are hereby repealed.

Section 2. Be it further enacted that any and all persons, firms and corporations having claims against said district for money advanced, paid or expended in defraying the preliminary costs and expenses for preliminary surveys, engineers' fees, attorneys' fees, and court costs, incurred or expended prior to the time of the assessment of benefits in said district, which assessment was filed in the office of the county clerk of Poinsett County, Arkansas, within six months from the date of the approval of this Act. When so filed said court may allow said claim, if found correct, or reject the same, and in the event said claim is allowed or rejected by the county court, the claimant or any landowner in said district, as the case may be, may appeal from such order of said court to the circuit court. After all claims have been allowed or rejected, and the time for allowance and appealing from allowance or rejection thereof has expired, the county court shall make an order appointing three persons, landowners in the district, as commissioners to assess a tax upon the real estate within the boundaries of the district, as described in Act No. 45 of the Extraordinary Session of the General Assembly of Arkansas, approved February 4, 1920, sufficient to pay said claims so allowed and ascertained by the county court as aforesaid. When said commissioners shall have assessed said tax in accordance with this Act, they shall file said assessment in the

office of the clerk of the county court of said county, who shall thereupon certify and extend the same upon the real estate taxbooks of said county, to the collector of said county for collection, and said collector shall thereafter, at the time and in the manner now provided by law for the collection of State and county taxes against real estate, collect said taxes and pay the same over to the treasurer of the county, and report his action to the next term of the county court held after such collection.

In the event of delinquency or failure of the landowners to pay such taxes, the collector shall offer such delinquent lands for sale at the time, place and in the manner now required by law for sale of lands delinquent for State and county taxes, and if said taxes be not paid before sale, shall sell the same in accordance with the laws providing for the sale of land delinquent for State and county taxes, for the taxes assessed by the commissioners against said land, interest thereon at six per cent and costs of sale. At such sales the clerk of the county court shall issue to purchasers of any of the said delinquent lands his certificate of purchase, and after the expiration of the time allowed by law for the redemption of the lands sold for State and county taxes, shall issue to the purchaser at such sale, or his assignee, his clerk's tax deed therefor, all of said acts to be

done and performed by said clerk in the manner now required by law for the sale of lands, delinquent for State and county taxes. The owner of any land, sold at such delinquent tax sale, may, within the time prescribed by law for the redemption of lands sold for State and county taxes redeem the lands so sold for said taxes, by paying to the clerk of the county court the amount of taxes, interest and costs paid by the purchaser at said sale, together with interest thereon at the rate of twenty-five per cent per annum from the date of such sale to the date of redemption. Said clerk shall thereupon issue his certificate or redemption from said sale, to said person so applying to redeem said land, and pay the money so collected by him over to the treasurer of said county, to the credit of the purchaser at said delinquent tax sale.

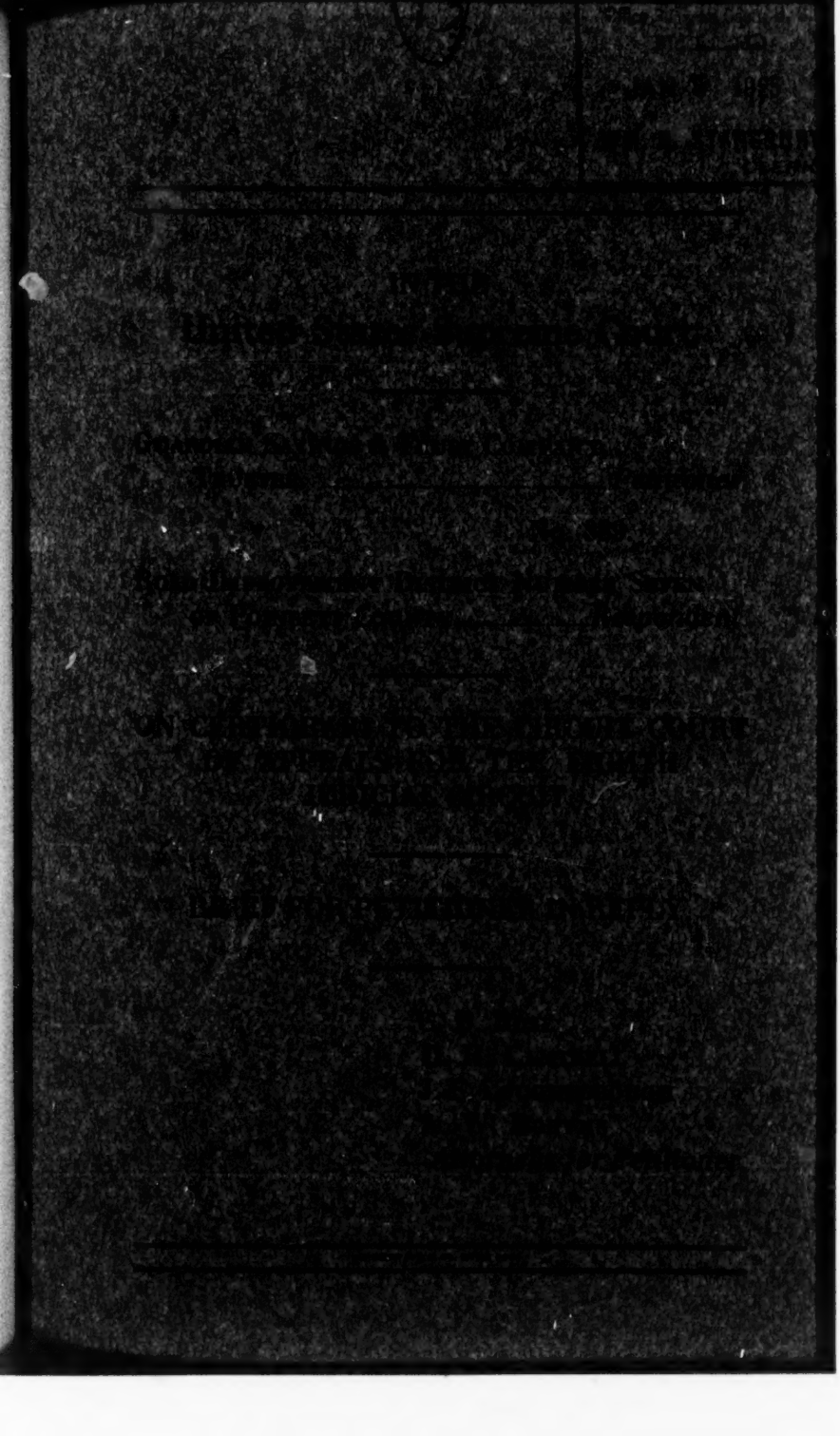
Section 3. When said taxes have been collected and paid in the manner hereinbefore prescribed, the same shall be paid over by the collector, or the clerk, as the case may be, to the treasurer of the county, who shall place said funds to the credit of the district for the purpose of paying the claims as aforesaid. Thereafter any person holding a final order or judgment allowing his claim, may present a certified copy thereof to the treasurer, and thereupon the treasurer shall draw a warrant payable to such

claimant, or his assignee, in the sum sufficient to pay the amount of said claim.

Section 4. Be it further enacted, that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Section 5. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared and this Act shall take effect and be in force immediately after its passage.

Approved March 23, 1923. (Special Acts of Arkansas of 1923, p. 1519).



IN THE

United States Supreme Court

GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, ... *Petitioner,*

v. No. 389.

ROAD IMPROVEMENT DISTRICT NUMBER SEVEN OF POINSETT COUNTY..... *Respondent.*

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH JUDICIAL CIRCUIT.

BRIEF FOR PETITIONER IN REPLY.

JURISDICTION OF DISTRICT COURT.

Counsel rely chiefly upon the decision of this court in *Heine* v. *Levee Commissioners,* 19 Wallace 655.

In that case no taxes had been levied to pay the bonds and no lien on behalf of the bond-

holders had been created: and it was held that the remedy was by mandamus.

In this case, in pursuance of section 9 of the act (petitioner's brief, page 57), the county court, before the issue of the bonds, levied a tax collectable each year until the bonds were extinguished, and this tax was a lien upon the property, superior to all other liens.

By section 13 of the act (petitioner's brief, p. 57), the taxes, if not voluntarily paid, are to be collected by a suit to be brought in the chancery court.

By section 17 of the act (petitioner's brief, p. 58), the commissioners of the district were authorized to pledge and mortgage all assessments for the repayment of the bonds, and this was done.

By section 20 of the act (petitioner's brief. p. 58), it was provided that if any bond or coupon should be overdue for thirty days, a receiver should be appointed, whose duty it should be to collect the taxes.

There is thus every basis of chancery jurisdiction. The taxes have already been levied, and they are to be collected only by a suit in chancery, which can as well be brought in the Federal court as in the State courts.

The Supreme Court of Arkansas has found none of the difficulties in appointing a receiver for an improvement district which troubled counsel and the court below.

In addition to the seven cases cited in our original brief, in which the Supreme Court of Arkansas has sanctioned the statutes providing for the appointment of receivers of improvement districts, we beg to call attention to the case of *Western Crawford Road Improvement District* v. *Missouri Pacific Railroad Company*, 157 Ark. 304, which has been recently affirmed by this court in 45 Supreme Court Reporter, page 31, where the act authorizing the appointment of a receiver is set out.

The case of the *Missouri Pacific Railroad Co.* v. *Sears*, 19 Ark. Law Reporter 309, referred to in our original brief, has since appeared in 265 S. W. 653.

It is true that the eight Arkansas cases were all cases where the district was not going to proceed with the work of improvement, and where it was being wound up; but if a receiver can be appointed to wind up an improvement district because it is not going to carry out its plans, we can see no reason why a receiver could not be appointed to wind up the district and pay its debts, when it has issued bonds and made default.

We cannot understand how the fact that the district has issued bonds can deprive the courts of a jurisdiction expressly conferred by the Legislature.

Counsel, throughout their brief, ignore the provision of the statute authorizing the district to mortgage its assessment of benefits. The making of a mortgage necessarily carries with it the right of foreclosure, and the appointment of a receiver is one of the commonest incidents of foreclosure proceedings.

After the bonds had been issued and purchased by Otis & Company at a premium of $1.03½, with no notice of any defense thereto, certain landowners of the district brought suit to restrain the collection of its taxes, and counsel say that the decree in that suit is a bar to this action. If that be true, no other improvement district in America will ever be able to sell its bonds. Neither the trustee for the bondholders nor the owners of the bonds were parties to the suit, and the State court made no attempt to bind them. On the contrary, it expressly excludes them from the operation of the decree, which provides (Tr. 7):

> "The court further finds that bonds have been issued and neither the bondholders nor the trustee are parties to this cause, nor have they appeared in any way, and therefore any and all rights claimed by said bondholders or the trustee can not be

affected by this decree, and all rights in their behalf remain undisturbed, and this decree is not intended to bar or affect such claims, the same not being adjudicated herein."

Counsel say that the district court made a new levy of its own, and thereby exercised legislative powers.

The original levy was for an amount sufficient to pay the entire bond issue, as it matured serially through the years. As a majority of the bonds were canceled and returned to the district, there was no need of collecting the full amount, and the court directed its receiver to collect only 2% for the years 1922 to 1924, inclusive, and 3.2% for the years 1925 to 1941, inclusive. It was not a new levy, but simply a direction to the receiver not to collect the entire amount that had already been levied.

We are quite sure that if the court had insisted upon the collection of the full amount levied by the county court, counsel would be complaining of the gross injustice, and with reason.

THE MERITS.

Counsel have argued the case upon the merits, and now that the case is here, we trust that the court will decide it finally. Unless it is disposed to do so, it will unnecessary to read the remainder of this brief.

BONDS NEGOTIABLE.

In the case of *Carson* v. *St. Francis Levee District,* 59 Ark. 513, the Supreme Court of Arkansas decided that local improvement districts organized outside of cities and towns were not restricted by the State Constitution, but could be invested with such powers as the Legislature saw fit to bestow.

Under that decision, bonds to the amount of many millions of dollars were issued by that district, which has leveed the Mississippi River upon the greater part of the eastern boundary of the State; and at least $100,000,000 of other bonds have been issued by levee, road and drainage district, upon the faith of that decision. In innumerable cases the Supreme Court of Arkansas has declined to enjoin the issue of bonds for such purposes.

Section 17 of the act creating this district (petitioner's brief, p. 58) expressly provides:

> "In order to do the work, the board may borrow money at a rate of interest not exceeding six per cent per annum, may issue *negotiable* bonds therefor, signed by the members of the board, and may pledge and mortgage all assessments for the repayment thereof."

Counsel suggest no reason why the Legislature should not have power to authorize the

issue of bonds by improvement districts, and we know that that is the only way any such improvements can be made, and that such bonds, to the extent of many billions of dollars, issued by improvement districts in most of the States of the Union, are now outstanding.

Counsel merely refer to county warrants, which are not negotiable because they are always drawn upon a particular fund, and the statute authorizing their issue does not pretend to confer upon them the quality of negotiability.

The Supreme Court of Arkansas is the final arbiter of the question, and it has decided that such bonds are negotiable.

Logan v. *Sidewalk District No. 6,* 163 Ark. 591.

RECITALS IN BONDS.

The bonds of the district (Tr. 8) contain the fullest and the most specific recitals, setting forth the statutes, and affirming a compliance with their provisions. They were bought by Otis & Company before maturity, in good faith, from James Gould & Son, reputable bond dealers, at a premium of 103½ (Tr. 25).

There is not the slightest testimony to impeach the good faith of Otis & Company, and it is not to be believed that they would have paid

a considerable premium for the bonds if they had entertained any suspicion of their validity.

That the purchaser of negotiable bonds will be protected by such recitals was decided by this court in *Knox County* v. *Aspinwall*, 21 Howard 538; and the doctrine has been reaffirmed by this court innumerable cases, of which it will suffice to cite the following:

Town of Venice v. *Murdock*, 92 U. S. 494.

Marcey v. *Township of Oswego*, 92 U. S. 637.

Town of Caloma v. *Eaves*, 92 U. S. 484.

Humboll's Township v. *Long*, 92 U. S. 642.

Commissioners v. *Clark*, 94 U. S. 287.

Bonham v. *Needles*, 103 U. S. 648.

County of Clay v. *Society for Savings*, 104 U. S. 579.

Pana v. *Bowler*, 107 U. S. 529.

Oregon v. *Jennings*, 119 U. S. 74.

Camanche County v. *Lewis*, 133 U. S. 198.

Bernard's Township v. *Morrison*, 133 U. S. 523.

Chaffee County v. *Potter*, 142 U. S. 355.

Andes v. *Ely*, 158 U. S. 313.

Graves v. *Saline County*, 161 U. S. 370.

Evansville v. *Dennett*, 161 U. S. 434.

Stanley Co. v. *Coler*, 190 U. S. 437.

The district court properly held that these recitals precluded all the defenses now set up by the respondent.

BOUNDARIES OF DISTRICT PROPERLY DESCRIBED.

By the terms of the act creating the district (II Road Acts of Arkansas, 1919, p. 1414) it is provided:

> "Section 1. An improvement district, to be known as Road Improvement District Number 7 of Poinsett County, Arkansas, is hereby organized for the purpose of improving the following road, making it a hard surface road:
>
> "A road beginning at the northeast corner of section thirty-six (36)), township eleven (11) north, range five (5) east, and running south on the township line to the southeast corner of section twenty-five (25) township ten (10) north, range five (5) east, and thence following the right bank of the St. Francis River to the west line of section thirty-six (36), township ten (10) north, range five (5) east, thence southerly to a

> junction on the county line with the road leading to Parkin, in Cross County; and said district shall consist of all quarter sections of land, any part of which is within three miles of said road at any point north and west of St. Francis River (or right bank), and shall include all towns within the territory."

An identical description was held to be sufficient in *Van Dyke* v. *Mack*, 139 Ark. 524; *Rayder* v. *McGehee East & West Highway Dist.*, 61 Ark. 269.

Certain lands east of the St. Francis River were added to the district by the act of 1920, which describes all the lands in the district by township, range and section numbers (petitioner's brief, p. 66-67).

Counsel say that the act of 1920 is void. If that were so, it would merely leave the district as originally laid out.

In point of fact, the act of 1920, which so excites the indignation of counsel, was extremely proper. At the time the original act was passed the St. Francis River constituted a serious impediment to intercourse, and, the road being upon its western side, it was felt that lands on the east should not contribute to the cost of its construction. The floodway which appears on the map attached to the brief of respondent carries substantially all the water of St. Francis

River out of its original channel, making it easy to pass from the east to the west, and therefore the lands on the east bank were included in the district after the plans for the floodway had been made and the work undertaken. This work has now been completed.

THE FLOODWAY.

Counsel say that the floodway destroys the district because it embraces a quantity of land which will not be subject to taxation for road purposes. We presume that there is no improvement district of any considerable extent which does not contain property belonging to the Government, the State or municipalities, and therefore not subject to taxation for local improvements; and if the rule be established that local improvement districts can be created only in territory where there is no land exempt from taxation for such purposes, the development of our country must come to a standstill.

In point of fact, the construction of the floodway relieves the road district of quite a burden.

The act creating Drainage District No. 7 of Poinsett County (Acts 1917, Vol. 1, p. 1053), casts upon that district the burden of constructing the bridge, and the only effect of the laying out

of the floodway is to reduce the cost of the work, in so far as the respondent district is concerned.

Section 32 of that act (p. 1080) provides:

> "The board shall have the right to carry the ditches across the highways, but shall construct bridges across such ditches where said highways are crossed at the expense of the district;" and

Section 34 (p. 1081) provides:

> "The word 'ditch,' as used in this act, shall be held to include drainage or lateral ditches, tile drains, levees, sluiceways, floodgates, and any other construction work found necessary for the reclamation of wet and overflowed lands."

Therefore, so far from the laying out of the floodway being a burden to the road district, it is a benefit, substituting a bridge to be constructed at the expense of the drainage district for a roadway that the road district would otherwise have to build.

The building of this floodway makes the construction of this road, with its incidental bridge across the floodway, absolutely essential, since otherwise there will be no way to pass from the east of the floodway to the west.

ASSESSMENTS OF BENEFITS.

Counsel say that there was no valid assessment of benefits, and therefore no valid bond issue.

The assessment of benefits was made, and as the commissioners realized that in consequence of the construction of the floodway the lands east of St. Francis River would be benefited and would be added by the next Legislature, they assessed that portion as well.

The Legislature, on February 4, 1920, added this territory, and confirmed the assessment of benefits (petitioner's brief 66).

It is the established law of Arkansas, and we presume of all other jurisdictions, that it is within the power of the Legislature to confirm and validate an assessment of benefits made by a local improvement district.

Sudberry v. *Graves*, 83 Ark. 344.

Caton v. *Western Clay Drainage Dist.*, 87 Ark. 8.

Moore v. *Board of Directors of Long Prairie Levee District*, 98 Ark. 116.

It is the established rule that legislative assessments will not be reviewed by the courts, if any benefits may reasonably be expected, even though extremely doubtful.

Union Transit Co. v. *Kentucky*, 199 U. S. 203.

Coffman v. *St. Francis Drainage District*, 83 Ark. 60, 61.

Board of Improvement v. *Southwestern G. & E. Co.*, 121 Ark. 105.

Fellows v. *McHaney*, 113 Ark. 364.

St. Louis, S. W. Ry. v. *Board*, 81 Ark. 562.

Tims v. *Mack*, 147 Ark. 117.

In *Milheim* v. *Moffatt Tunnel Imp. District*, 262 U. S. 710, this court held:

> "If a proposed improvement is one which the State has authority to make and pay for by assessments on property benefited, the Legislature, in the exercise of the taxing power, has authority to determine by the statute imposing the tax what lands are benefited thereby, and its determination is conclusive, and cannot be assailed under Constitutional Amendment 14, unless wholly unwarranted and a flagrant abuse, and, by reason of its arbitrary character, a mere confiscation of the particular property."

It is also certain that a legislative assesment may be made without giving the property owners an opportunity to be heard.

Wagner v. *Baltimore*, 239 U. S. 219.

St. Louis S. W. Ry. v. *Grayson*, 72 Ark. 120.

Spencer v. *Merchant*, 125 U. S. 245.

French v. *Barber Asphalt Co.*, 181 U. S. 341.

COST OF THE IMPROVEMENT.

Counsel say that the cost of the improvement will be $750,000, and that the assessment of benefits is only $462,000. The witnesses Ayres, McMillan, Pride and Fergus, all capable engineers, testify that the cost will not exceed $346,654.80, from which there must be deducted a bridge across the floodway, to be constructed by the Drainage District which will leave the actual cost to the district less than $300,000. The assessment of benefits bears interest at 6 per cent.

We do not understand how counsel can say, on page 3 of their brief, "the lowest estimate of the cost of the construction of the improvement was $450,000;" when on page 29 of the transcript the testimony of these four engineers gives their estimates as follows:

Ayres,	$323,768.50
McMillan,	330,954.48
Pride and Fergus,	346,645.80

Respectfully,

G. B. Rose
D. H. Cantrell
J. F. Loughborough
A. W. Dobyns
Attorneys for Petitioner.

FILED
MAY 15 1924
WM. R. STANSBU
CLERK

No. [redacted]389

—IN THE—

Supreme Court of the United States

GUARDIAN SAVINGS & TRUST COMPANY, AS TRUSTEE,
Petitioner,

vs.

ROAD IMPROVEMENT DISTRICT NUMBER 7,
POINSETT COUNTY, ARKANSAS,
Respondent.

Motion of Respondent for Denial of Writ of Certiorari

and

Response to Petition for Writ of Certiorari.

HENRY D. ASHLEY,
Solicitor for Respondent.

—IN THE—

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GUARDIAN SAVINGS & TRUST COMPANY, AS TRUSTEE,
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ROAD IMPROVEMENT DISTRICT NUMBER 7,
POINSETT COUNTY, ARKANSAS,
Respondent.

MOTION OF RESPONDENT FOR DENIAL OF WRIT OF CERTIORARI.

Respondent respectfully moves the Court to deny the writ of certiorari in above entitled case, for the following reason:

1. There has been filed and served no verified petition for the writ as required by rule 37, of this Court.

Respectfully submitted,

HENRY D. ASHLEY,
Solicitor for Respondent.

—IN THE—

Supreme Court of the United States

GUARDIAN SAVINGS & TRUST COMPANY,
Petitioner,

vs.

ROAD IMPROVEMENT DISTRICT NUMBER 7,
OF POINSETT COUNTY, ARKANSAS,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

1. The decision of the Circuit Court of Appeals is not in conflict with the decisions of the Supreme Court of the United States.

Rees v. *The City of Watertown*, 19 Wall. 107; 22 L. Ed. 72;
Heine et al v. *The Board of Levee Commissioners*, 19 Wall. 665; 22 L. Ed. 223;
Meriwether v. *Garrett*, 102 U. S. 472; 26 L. Ed. 197;
Thompson v. *Allen*, 115 U. S. 550; 29 L. Ed. 472.

Commissioners Road Improvement District No. 2 of Lafayette County v. *St. Louis S. W. Ry. Co.*, decided by this Court, merely holds that a proceeding in a State County Court to assess benefits and damages growing out of a road improvement was properly removed to Federal District Court. The instant case decides that a Federal Court of Equity cannot be made a tax collector.

2. The Act of the General Assembly of Arkansas of 1923, No. 620 (Special Acts page 1519) abolishing the dis-

trict, does not have the effect of depriving the petitioner of relief in the State Court, if the bonds issued by the district and now claimed by petitioner are valid obligations. We do not agree with counsel for petitioners that the Legislature may pass a law impairing the obligation of a contract.

3. We apprehend that neither this court, nor the United States Circuit Court of Appeals will take notice of the number of suits that may have been instituted in the United States District Court of Arkansas, whether the same be for the collection of bonds, or other indebtedness.

4. The Constitution of Arkansas does not, either expressly or impliedly authorize the Legislature to pledge as security for indebtedness contracted, either by the State or any of its political subdivisions, the taxes which may be assessed and collected from time t time.

5. Petitioner has a complete and adequate remedy at law.

In the case of *Weona Land Company* v. *Road Improvement District No. 7, et al*, in the Chancery Court of Poinsett County, Arkansas, it was held that the assessment of benefits under which it was attempted to levy a tax to pay the costs of constructing the proposed improvement therein, was void, and the Act of the extraordinary session of the General Assembly of the State of Arkansas, for the year 1920, attempting to confirm the assessment of benefits was likewise held void, for the reason that 3,000 acres of land attempted to be embraced in the district was not subject to the tax, and for the further reason that the costs of constructing the improvement exceeded the benefits. Under the decisions of the Supreme Court of Arkansas this rendered all contracts except contracts for preliminary expenses in the organization of the district void. I nother words, no valid contract can be entered into by the district until there is a lawful assessment of benefits.

The obligation to assess taxes is not a lien on the property on which they ought to be assessed. This point seems to have been settled by this Court in many decisions.

Heine v. *The Board of Levee Commissioners, supra.*

The case *State Bank of Wellston* v. *Mississippi Valley Trust Co.*, decided by the Circuit Court of Appeals of Eighth Circuit, is not in conflict with instant case.

Though not yet reported we quote the following from the opinion of Judge Sanborn:

> "This case presents the single question whether the taxes levied on the property of a road District in Arkansas to pay for a road improvement should be applied, first, to the payment of the first series of Bonds issued by that District for $370,500.00, or, pro rata, to the payment of that series and a subsequent series of $200,000.00 issued by that District."

WHEREFORE, respondent prays that said petition be dismissed, and for all proper relief.

Respectfully submitted,

HENRY D. ASHLEY,
Solicitor for Respondent.

FILED
DEC 23 192
WM. R. STAN

—IN THE—

United States Supreme Court

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

Brief for Respondent.

HENRY D. ASHLEY,
J. F. GAUTNEY,
Attorneys for Respondent.

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—IN THE—

United States Supreme Court

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

CERTIORARI TO CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Statement, Brief and Argument of Respondent.

STATEMENT

Road District No. 7 was created by Act No. 322 of the General Assembly of Arkansas in 1919 (See Acts of Arkansas 1919, Road Vol. 2, page 1413). This special Act was attempted to be cured by Act No. 45, extraordinary session of 1920. (For said Act see page 66 appendix to petitioner's brief).

The district is composed of forty-two sections of land shown on map attached to this brief, mark-

ed Exhibit "A", the same being exact duplicate of Exhibit "A" attached to abstract and brief of respondent filed in the United States Circuit Court of Appeals and is a clarified copy of map attached to transcript of record at page 30.

At the July Term, 1919, of the County Court of Poinsett County, Arkansas, and prior to the time of the formation of Road District No. 7 and prior to the filing of the approval of the assessment of benefits in said Road District, Drainage District No. 7 of Poinsett County, Arkansas, by special Act of the Legislature (see Acts of Arkansas, 1917, Volume 1, page 1053) had appropriated for use as a right of way for the construction of a drainage canal the area marked "Floodway Drainage District No. 7" containing three thousand acres of land which, as will be seen from an examination of the map (Exhibit "A", attached to this brief) runs diagonally through the Road District. The lands embraced in this floodway were included in the Road District and assessed for benefits therein. The proposed roadway was nine miles in length and was located upon the range line lying between Ranges 5 and 6. No highway existed along the proposed route.

The estimated cost of the improvement as shown in the case of Taxpayers of Road District No. 7 vs. Road District No. 7, et al., brought and tried in the Chancery Court of Poinsett County was $750,000.00. The assessment of benefits was $462,000.00. (See transcript of record page 18). The benefits assessed against the three thousand acres of land in the floodway aggregated approximately, $70,000.00, (See transcript of record page 15) so that the actual benefits in the District did

not exceed in the aggregate $400,000.00. The lowest estimate on the cost of the construction of the improvement was $450,000.00. (See transcript of record p. 30). This proposed Road District, as heretofore stated, was formed not under the general law but by Special Act of the Legislature and at no time was any notice given of the assessment of benefits or of the filing of the plans of the proposed improvement in the county court, as prescribed by said Act 322. (See transcript of record p. 14). At the time the pretended assessment of benefits was filed December 16, 1919 (See p. 28 transcript of record) none of the lands south and east of the St. Francis River and now in the proposed District were in the District and the commissioners could not therefore, in the manner attempted, assess benefits on lands not in the District. This fatal defect was attempted to be cured by said Act No. 45. So it will be observed that the land owners in the District never had an opportunity to protest against this high-handed method of taking their property without due process of law. In December, 1920, as soon as the land owners discovered that their lands were to be taken from them, suit was filed in the Chancery Court of Poinsett County, Arkansas, by Weona Land Comany, et al., land owners, against the District, its commissioners and the Construction Company, attacking the legislative assessment of benefits on the grounds that the assessment was void as being arbitrary; that demonstrable error had been committed by the Legislature in making the assessment because the Legislature attempted to assess for benefits thereof lands which had been previously taken and appropriated for use by Drain-

age District No. 7 aggregating three thousand acres and which lands are now in use by said Drainage District; and upon the further ground that the cost of the construction of the road improvement exceeded the benefits.

At the May Term, 1922, of the Chancery Court of Poinsett County a decree was rendered in favor of plaintiffs, declaring the assessment of benefits and the plans and specifications filed in the office of the County Clerk December 16, 1919, and Act No. 45 of 1920 to be void, for the reasons that the plans and specifications, assessments of benefits, and the Act of the Legislature undertaking to approve and confirm the same, contained a material change in the plans; that the floodway of Drainage District No. 7 had taken and appropriated three thousand acres of land which could not be assessed for benefits in Road District No. 7 and, therefore, the assessment of benefits and plans and specifications thereunder were declared void. No appeal was taken from this decree and it became final.

Bonds of the District were issued in the sum of $230,000.00, dated April 1, 1919, though they were not, in fact, issued until after the 4th of February, 1920, (See transcript of record p. 11) the date of the approval of Act No. 45. (See appendix to brief of petitioner p. 68). These facts were known to Gould and to Otis & Company, the bond brokers. On June 15, 1920, (See transcript of record p. 26) James Gould delivered to Otis & Company the $230,000.00 in bonds and received from Otis & Company $17,250.00 (See transcript of record p. 27). There is no evidence in the record showing that Gould had any right to the posses-

sion of these bonds. The remaining $212,750.00 was retained by Otis & Company and credited to Road Improvement District No. 7 and the payments to the District were made in installments from time to time, beginning September 3, 1920, and ending February 27, 1922. On February 15, 1921, (See transcript of record p. 32) Otis & Company were notified of the pendency of the suit in the Chancery Court of Poinsett County to cancel the assessment of benefits and carried on a correspondence with the Chapman & Dewey Company, landowners in the District, concerning the same. Most of the money paid out by Otis & Company, aggregating $111,000.00, was unlawfully made away with by Gould and one of the commissioners of the District. Practically all the bonds are in the hands of Otis & Company.

Section 20 of said Act 322 provides that in case of default in the payment of bonds or interest it shall be the duty of the CHANCERY COURT OF POINSETT COUNTY to appoint a Receiver to collect the taxes. Notwithstanding this provision of the Act of the Legislature on August 15, 1922, petitioner filed its complaint in the United States District Court, alleging default in the payment of interest on the bonds and praying for the appointment of a receiver. The land owners of Road District No. 7 appeared and were made parties, contested the proceedings and challenged the the jurisdiction of the court. A decree adverse to the land owners was rendered in the United States District Court, whereupon the land owners appealed to the United States Circuit Court of Appeals for the Eighth Circuit, where a decree was rendered dismissing the bill, without prejudice, at the cost

of the plaintiff, appellee in said court. For decree and opinion of United States Circuit Court of Appeals see pages 46 to 49 of transcript of record. The decree of United States District Court contained *inter alia* the following:

> "It is further considered, ordered and decreed that the Receiver heretofore appointed in this cause *will proceed to collect the taxes heretofore levied* upon the real property within said district, but in view of the fact that only $125,000.00 of said bonds will be outstanding, the rate of taxation fixed at the time of the issuance of said bonds will be reduced to two per cent. upon the assessment of benefits in each of the years 1922 to 1924, inclusive, and 3.2 per cent. of the amount of the assessed benefits for each of the years 1925 to 1941 inclusive, and said Receiver will remit to the Chase National Bank of the City of New York, at its office in the City of New York, N. Y., on or before the first day of March and September of each year, the amount necessary to pay the bonds and coupons not surrendered, as they mature, adding to each remittance the sum of 12½ cents for each $100.00 par value of bonds, and the sum of 25 cents for each $100.00 par value of coupons, the same being the agreed compensation to the said bank for paying, cancelling and returning the said bonds and coupons." (See transcript of record p. 20).

Replying to the brief of petitioner we will follow the headings designated in that brief.

"HISTORY OF LEGISLATION"

As we hardly think this court is interested either in the price of cotton or rice in the year 1919 or the number of automobiles in Arkansas, nor in the amount of bonds issued by levee and drainage districts in Arkansas, we will make no further answer to that part of petitioner's brief, except to call attention to the mis-statement at the top of page 12 of petitioner's brief, wherein it is stated as follows:

> "From a credit standpoint they (Road Improvement Districts) had neither lineage to revere nor posterity to protect. They were created to make a certain improvement and when this was done and paid for they ceased to exist," citing *Williams* vs. *City of Fort Smith*, 263 S. W. (Ark.) page 397.

(Section 19, of Act 322, page 1423, Volume 2, Road Acts of Arkansas, 1919, provides as follows:

> "The district shall not cease to exist upon the completion of the roads, but shall continue to exist for the purpose of preserving them and keeping them in repair. To this end, the County Court may, from time to time, make such additional levies, based upon the assessment of benefits, as may be necessary for that purpose."

"REPEALING ACT VOID"

We agree with petitioner that if the bonds of the District are valid and subsisting obligations then the Repaling Act is void. But we do not agree that the bonds are valid or that they ever had legal existence.

The U. S. District Court by its decree held that the bonds were valid obligations of the District, notwithstanding the fact that a court of competent jurisdiction in a suit instituted for the purpose, had declared by its decree from which there has been no appeal, that the assessment of benefits and the plans and specifications for the District were void. It is the uniform holding of the Supreme Court of the State of Arkansas, that all contracts made, attempted to be made or entered into by a road or drainage district under the laws of Arkansas, can have no legal existence until there has been a valid assessment of benefits in the District, and this assessment must be approved by the court, or by lawful act of the legislature. All contracts except for preliminary expenses made before there has been an assessment of benefits are premature, void and unenforcible.

In *Thibault* vs. *McHaney,* Receiver, 119 Ark. 188, it was held that there could be no estoppel in favor of a contractor and against the land owners where the contract was made before an assessment of benefits had been made and lawfully approved. Contracts made in advance of the assessment of benefits, and claims arising thereunder are premature and void and not binding on the District. (Page 199 of Thibault vs. McHaney.)

In *Gould* vs. *Toland,* 149 Ark., 476, it was held that where there was no assessment of benefits in a road improvement district a contract with the bond dealer for the sale of the bonds of the district is unenforcible except as to advances for preliminary expenses.

In *Morgan Engineering Company* vs. *Cache River Drainage District,* 122 Ark., 491, the court

held that a Special Act of the Legislature could not cure a fatally defective district which had previously been created by the Act of the Legislature. The defect consisted in a failure to properly describe the boundaries of the district, and accordingly held that contracts made with the district were void. But the court held that a district void from the beginning could not be cured by a Curative Act of the Legislature passed at a later date.

In *Robinson* vs. *Indiana and Arkansas Lumber and Manufacturing Company,* 128 Ark., 550, it was held that land appropriated for use in an improvement district could not after such appropriation be taxed by the State, much less by a political subdivision of the State.

In the case at bar it was known or in the exercise of reasonable prudence could have been known, by Otis & Company, that Act No. 322, 1919, was void for the reason that there was a failure to describe the district undertaken to be created by the Act or to give its boundaries.

We take it that it is elemental that in undertaking to tax property, whether for local improvements or under the general laws of taxation, it is necessary in order to give the taxing powers jurisdiction to levy a valid tax against the property that the property must be described in the instrument which seeks to levy the tax, and that this description must be sufficiently definite to enable the same to be located with reasonable certainty. It is the uniform rule of the courts of Arkansas that an attempted levy of a tax, either for State and County purposes, or for the purpose of local improvement upon real property, where there has been a failure to describe the real property with sufficient de-

finiteness to enable it to be properly identified and located, is void. Road Improvement Districts under our law are *quasi* public corporations, with such powers only as are conferred by the Act creating them. If the Act creating the District is void because it fails to describe with sufficient certainty the boundaries of the district, then there is a failure to create an improvement district, because an improvement district which does not embrace the property sought to be taxed is a nullity and has no more force or effect than would a deed signed in blank, which failed to describe the property intended to be conveyed.

Act No. 322 undertakes to include within the district all quarter sections of land any part of which is within three miles of said road at any point on the right bank of the St. Francis River. The commissioners of the Road District did not assess the lands in the District for benefits for the reason that there was no description of the lands embraced in the district. Therefore the Legislature could not, by the passage of a Curative Act, cure a thing which was a nullity. If the assessment of benefits in the district had merely been irregular, because of a failure to observe some direction as to procedure, manner and form of taking an oath, or the manner and form of making the assessment, then, of course, the Legislature could cure such irregularity, but the Legislature could not cure, by Act, an assessment that was void from the beginning. This is the effect of the holding in *Morgan Engineering Company* vs. *Cache River Drainage District,* Supra.

The decree of the Poinsett Chancery Court found that the Curative Act undertook to cure an

assessment of benefits against 3,000 acres of land embraced in the floodway of Drainage District No. 7, which lands were not subject to taxation for any purpose. As shown by the map, Exhibit "A," page (30), of the record, this floodway traverses the district from north to south for approximately nine miles, and embraces 3,000 acres of land, upon which it was attempted to assess benefits aggregating $70,000.00. It will also be observed from an examination of this map, that the proposed highway is crossed by this floodway, and that such crossing would have the effect of destroying any supposed benefit to any lands on the west side of the floodway by the construction of a part of the road on the east side of the floodway and vice versa. This floodway divides the district almost in half, and forms an effectual barrier between the lands on the west side and on the east side. The ditches or canals constructed for carrying water in this floodway are each 100 feet in width and an approximate depth of 12 to 14 feet. Levees averaging 15 feet in height are constructed on the east and west boundaries of this canal. It is hardly conceivable that any court would declare such a district to be a valid organization which was so recklessly formed, even though attempted to be formed by an Act of the Legislature.

The decree of the Poinsett Chancery Court held the assessment of benefits attempted to be made invalid because demonstrable error was committed by the Legislature in attempting to assess lands for benefits which could not be so assessed, and that this rendered the entire assessment inequitable and void.

The Supreme Court of the State of Arkansas,

a court of last resort, has uniformly held in such cases, that there can be no valid or binding contract entered into by an improvement district until there has been a valid assessment of benefits. The holders of bonds are certainly entitled to no greater consideration that the holder of any other contract. It is idle to say that the holders of bonds of improvement districts are innocent purchasers for value and without notice. Such bonds are not negotiable paper within the law merchant and have never been received or used as such. Before bond brokers purchase such bonds (and Otis & Company are bond brokers) they require a complete transcript of the record and proceedings of the district, and the opinion of an attorney, as to the validity of the formation of the district. If the brokers have failed to observe the fatal defects in the formation of the district, or if the attorney selected by them has failed to observe such fatal defect, then the loss for such failure should be charged to the brokers or to their attorneys. Otis & Company knew when they were negotiating for the purchase of bonds, that no assessment of benefits had been made at the time of the purported issuance of the bonds, April 1, 1919, because no assessment of benefits of any kind had been made at that time. They knew, if they cared to know, that the district attempted to be formed by Act No. 322 of the Legislature, was void because there was no description of the boundaries of the proposed district. The bonds recite that the assessment of benefits had been cured by Act No. 45, approved February 4, 1920. This was certainly notice to any person of ordinary prudence (save a bond broker), that the assessment of benefits was at least defective be-

fore the Act of the Legislature was passed, and that something must be materially wrong with the bonds, otherwise they would not have been dated April 1, 1919, and at the same time recite the title and date of approval and number of an Act passed February 4, 1920. If investigation had been made by the brokers (and they still own the bonds) as to whether or not the Curative Act was valid. they would have discovered that there was an attempt to assess for benefits 3,000 acres of land in the district, not subject to such taxes, and that the district was void from the beginning for the reason that there was a failure to properly describe the lands attempted to be embraced in the district.

We are therefore confronted with a condition in this law suit which we submit ought not to arise. The land owners in the district by suit in a court of competent jurisdiction have obtained a decision and decree which declares the assessment of benefits invalid and enjoins the collector from undertaking to collect any assessment of taxes within the district, and which has the effect of declaring all contracts, save for preliminary expenses, to be null and void, and this decree has not been appealed from, and in so far as it relates to the taxpayers or to any person suing in the courts of the State of Arkansas, is a valid and binding decree and judgment of the court. On the other hand, we have the decree rendered by the United States District Court for the Eastern District of Arkansas, which in effect, ignores the decree and says that it is not binding on the holders of bonds, because they are innocent purchasers for value and without notice.

The United States Supreme Court has frequent-

ly held, in cases appealed from the United States District Court, in Arkansas, that the holder of county warrants, the obligation of a County, issued so that it passes by delivery and without endorsement, can not be a holder for value and without notice of such county warrant, but that such warrant is at all times subject to inquiry as to the validity of its issue. If this be true, as to a county warrant, why should it not be true as to the bond of an improvement district? Both are political subdivisions of the State, the boundaries of each are defined by the Legislature, and the powers conferred upon them are alike given by the Legislature. An improvement district rests solely upon the Act creating it and it has no power save those conferred by the Act creating it. The obligation which is issued by it can never become the obligation of an individual. It can only be paid by a tax levied on the land. Judgments can be rendered against the land only. The land in the district is liable for the taxes. Certainly improvement districts ought not to be regarded as having the right to issue commercial paper if counties are not permitted to do so.

Thibault vs. *McHaney*, 119 Ark., p. 188;
Gould vs. *Toland*, 149 Ark., p. 476;
Robinson vs. *Indiana and Arkansas Lumber and Mfg. Co.*, 128 Ark., p. 550.

TRIAL

The court erred in holding Otis & Company, not a party to this suit, to be innocent purchasers of $125,000.00 of the so-called bonds, pretended to be issued by this District for the following reasons:

A. Said District Warrants are not negotiable instruments of such character as to be entitled to the rights of innocent purchasers for value because

said so-called bonds are no more than special assessment warrants, payable only out of assessments made against lands within the limits of said alleged Road District No. 7.

C. Because the final decree heretofore rendered by the Chancery Court of Poinsett County, Arkansas, binds all persons, firms and corporations directly or indirectly connected with said district or having any contractual relations with said district.

D. Because said Otis & Company, although not actual parties to said suit in the Chancery Court of Poinsett County, Arkansas, had actual knowledge of the pendency of said suit long before the final decree therein was rendered, and were proper parties to said suit and could have become parties at any time by entering their appearance.

These District Warrants are not negotiable instruments.

The so-called bonds contain the following clause:

> "This bond and the attached interest coupons, as well as all other bonds and coupons forming a part of this issue, are payable out of proceeds of taxes heretofore legally levied upon the real property, railroads and tramroads embraced within said district, and benefited by said improvements, and are secured by a prior lien on all of said real property, railroads and tramroads."

See transcript of record, p. 8.

See *Crawford & Moses*, Stat. of Ark., 1921, Secs. 7767 and 7769; also

Rector vs. *Straus*, 134 Ark., p. 374.

It is to be noted that the Bondholders are parties to this suit through Guardian Savings and

Trust Company, Trustee for all the Bondholders; said Guardian Savings and Trust Company having filed the bill in the Federal Court, and being authorized by the so-called mortgage to take all steps for the enforcement of the rights of the Bondholders. (See transcript of record p. 10).

"SECURITY OFFERED TO BOND PURCHASER"

This is but a repetition of the irrelevant argument contained in "History of Legislation." To support contention that these Road District assessments are not taxes counsel cites two cases; *Illinois Central Railroad* vs. *Decatur,* 147 U. S., 197. This was a case in which this court held that the charter of a railroad exempting it from taxes would not include special assessments; and *Sanders* vs. *Brown,* 65 Ark., 499, where the question was as to the jurisdiction of the Circuit Court over a case involving less than $100.00, the court holding that a warranty in a deed from which was excepted "taxes for 1893" did not include special assessments.

"REASONING AND AUTHORITIES OF THE DECISION OF THE COURT OF APPEALS."

Before making any answer to the comments of counsel for petitioners on the cases cited by Judge Stone in delivering the opinion in the Court of Appeals we must beg to call the court's attention to the persistent habit of counsel for petitioner to dodge the plain provision in Section 20 of Act 322 conferring the right to appoint a receiver to collect taxes upon "The Chancery Court of Poinsett County."

This persistent effort to avoid the language of the Act, delegating the power to collect taxes, occurs at the bottom of page 21 of petitioner's brief and at six other places in the brief. We also beg to call attention to the fact that in the decree rendered by Judge Trieber, in the United States District Court (see page 20 of transcript of record) there is in fact and in law a new levy made, because the rate of taxation fixed at the time of the issue of said bonds was reduced by the decree to 2 per cent. upon the assessment of benefits in each of the years 1922 to 1924 inclusive, and to 3.2 for each of the years 1925 to 1941. This clearly shows the inaccuracy of the statement of counsel for petitioner on page 21 as follows: "In considering the application of these cases, it should be borne in mind that in this case there was a levy of the installments of the assessments of benefits, or *taxes* made in advance for the full term necessary to pay the bonds and made before the bonds were issued." It will be clearly seen from the examination of the decree that the United States District Judge made a new levy for a different amount under the decree long after the issuance of the pretended bonds.

The quotation of Judge Stone in the opinion from the Meriweather case is from the opinion rendered in that case by Mr. Justice Field concurred in by Mr. Justice Miller and Mr. Justice Bradley. Counsel for petitioner quotes from the brief opinion rendered in the Meriweather case by Mr. Chief Justice Waite and the omission of the following from the middle of the quotation, is to say the least, extremely significant. The words omitted are, " if no such authority exists the reme-

dy is by appeal to the legislature which alone can grant relief." On page 25 counsel for petitioner says, "of course, the receiver to be appointed by the Governor to collect taxes was a state officer, and according to familiar rules the Federal Court could not make an appointment to a state office." The three commissioners of Road District Seven were, of course, state officers and if default occurred in the payment of bonds or interest the receiver which the legislature authorized "the Chancery Court of Poinsett County, Arkansas," to appoint would by the same token be a state officer.

The avoidance of the words, "Chancery Court of Poinsett County, Arkansas," occurs twice on page 27 of petitioner's brief. At the top of page 27 counsel for petitioner says, "there is express provision in the state law conferring jurisdiction *on a court of equity* to entertain a suit on the bonds." Near the bottom of the same page 27, counsel for petitioners says, "even without the express provision of the law authorizing a court of equity to appoint a receiver." At the bottom of page 27, counsel for petitioner says, "Court below held that the road district could not mortgage its assessment of benefits." Such a question was not passed on or alluded to by Judge Stone in his opinion. The only reference to it being as follows, "This is a bill brought by a trustee, for bondholders under a *so-called* mortgage to obtain the appointment of a receiver and the payment of past due bonds and interest coupons issued by a road improvement district." We do not think further comment on the unbroken line of authorities cited by Judge Stone to support the proposition that "it is not only not one of the inherent powers of a

court to levy and collect taxes but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government."

It would seem to us that the decree of the United States Circuit Court of Appeals must be affirmed unless that line of cases is to be overruled by this court.

"A MORTGAGE OF INCOME TO BE REALIZED IN THE FUTURE IS VALID."

Under this heading of petitioner's brief we only beg to call attention to the remarkable admission of counsel in their quotation from *Rees* vs. *City of Watertown*, 19 Wall., 107. After the word "permit" in counsel's quotation the following occurs in the opinion of the court:

> "We can not, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed."

"UNITED STATES COURTS WILL ASSUME ALL JURISDICTION THAT THE STATE COURTS COULD ASSUME."

At the top of page 32 counsel for petitioner makes the following remarkable statement:

> "In a case properly within its jurisdiction *the District Court of the United States*, is as much *the Chancery Court of Poinsett County* as is the State Chancery Court and the jurisdiction is expressly conferred on the United States District Court by the Act itself."

In answer to this absurd statement we beg leave to quote from the opinion of Mr. Justice Miller in *Heine* vs. *Board of Levee Commissioners*, 19 Wall., 655-661:

"It is said in argument that plaintiffs have a lien upon the taxable property of the district for the payment of these bonds, and that equity always enforces liens where no other mode of enforcing them exists. Whether this be the true doctrine of a court of equity to the full extent here claimed, we need not decide. Nor need we decide whether taxes once lawfully levied are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by charter or unless the corporation is authorized by the Legislature to declare them to be liens" * * * * * *

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested as in the exercise of an original jurisdiction in any Federal Court. *It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose.* It is not only one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State Government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure the end of which no wisdom can forsee."

"THE RIGHT TO A RECEIVER IS A SUBSTANTIVE RIGHT."

The right to have a receiver appointed for the purposes set out in Act 322 is not substantive but is purely remedial. No court has an inherent right to appoint a receiver, or any other person, by whatever name he may be called, to collect or levy taxes.

Under our form of government the power of taxation is in the Legislature. The right to levy and collect taxes can only be acquired by express delegation from the legislative body and can be exercised by no other body or person than the one designated by the Legislature. The Legislature of Arkansas had in this case delegated the power to tax to a Board of Commissioners composed of the following: B. F. Rogers, C. A. Blanton and H. B. Thorne, or, if default was made in the payment of a bond or coupon for thirty days, *"THE CHANCERY COURT OF POINSETT COUNTY, ARKANSAS"* was to appoint a receiver to levy and collect the taxes assessed for this improvement. The appointment of a receiver by any other court than the CHANCERY COURT OF POINSETT COUNTY is contrary to the express delegation of the Legislature of Arkansas and is, therefore, a usurpation of the power of that body. The appointment of the receiver to levy and collect taxes therefore is not on account of the equity powers of the CHANCERY COURT OF POINSETT COUNTY, but on account of an express delegation from the Arkansas Legislature. The right, therefore, is purely remedial and is not substantive so as to be administered by any other court than the CHANCERY COURT OF POINSETT COUNTY, ARKANSAS.

"RECEIVER SANCTIONED BY ARKANSAS DECISIONS."

Under this heading counsel cites one Federal Court decision, *State Bank of Wellston* vs. *Mississippi Valley Trust Company*, 297 Fed., 563, why, we are unable to conjecture.

Judge Sanborn in the opening words of his able opinion in that case says:

> "This case presents the single question whether the taxes levied on the property of a Road District in Arkansas to pay for a road improvement should be applied first to the payment of the first series of bonds issued by that District for $375,000.00, or pro rata to the payment of that series and a subsequent series of $200,000.00 issued by that District."

In the case of *Howard Sevier Road Improvement District No.* 1 vs. *Hunt* cited and quoted on page 51 of petitioner's brief, the question of jurisdiction was neither raised nor passed on.

In the case of *Missouri Pacific Railroad Company* vs. *Sears*, cited on page 52 of petitioner's brief, no question of jurisdiction of a Federal Court was involved and the Receiver was appointed by the *Chancery Court of Fulton County, Arkansas.*

FURTHER GROUNDS FOR LACK OF JURISDICTION OF FEDERAL COURT.

The United States Circuit Court of Appeals in its opinion by Mr. Justice Stone says: "Appellants state fourteen points in their brief, seven of which they argue. In the view taken by this court it is necessary to examine but one of these." Although we feel that the reasoning of the opinion and the authorities cited by the Court of Appeals for its decree dismissing the bill of petitioners, filed in

the United States District Court are correct, we beg to respectfully call the court's attention to other sufficient reasons, as it seems to us, and as urged in the Court of Appeals for dismissing the bill for lack of jurisdiction.

The trial Court erred in taking and exercising jurisdiction in this case for the reason that the Chancery Court of Poinsett County, Arkansas, first acquired jurisdiction of the same matter involved in this suit and both this suit and said suit in equity, *Weona Land Company* vs *Road Improvement District No. 7* of Poinsett County, Arkansas, involving the very matters in controversy in this case, having been filed before this suit was brought and both this suit and that being proceedings *in rem* or at the least, *quasi in rem*, this court has no jurisdiction under the law as laid down by the Supreme Court of the United States in case of *Kline* vs. *Burke Construction Company* decided November 20th, 1922.

The court erred in exercising jurisdiction herein, the Chancery Court of Poinsett County having first acquired jurisdiction.

See *Kline* v. *Burke Construction Company*, 260 U. S., p. 226;

Conclusiveness of proceedings *in rem*, 23 Cyc., p. 1408.

A proceeding had in a proper court for the laying out of a public road is in the nature of a proceeding *in rem* and binds all the world.

23 Cyc., p. 1412.

In *Milcreek Tp.* vs. *Reed*, 29 Pa. St., p. 195, Lewis, C. J., said:

> "The laying out of a public road is in the nature of proceeding *in rem*, and binds all the world."

Farmers Loan & T. Co. v. *Lake St. Elevated*, 177 U. S., 51.

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."

We also beg to call the court's attention to the fact that Section 13 of Act 322 provides that said Board of Commissioners shall enforce the collection by chancery proceedings in the Chancery Court of Poinsett County in the manner provided by Sections 23 and 24 of Act 279. (See page 58 Appendix to petitioner's brief). And that said Sec. 23 provides *inter alia* as follows:

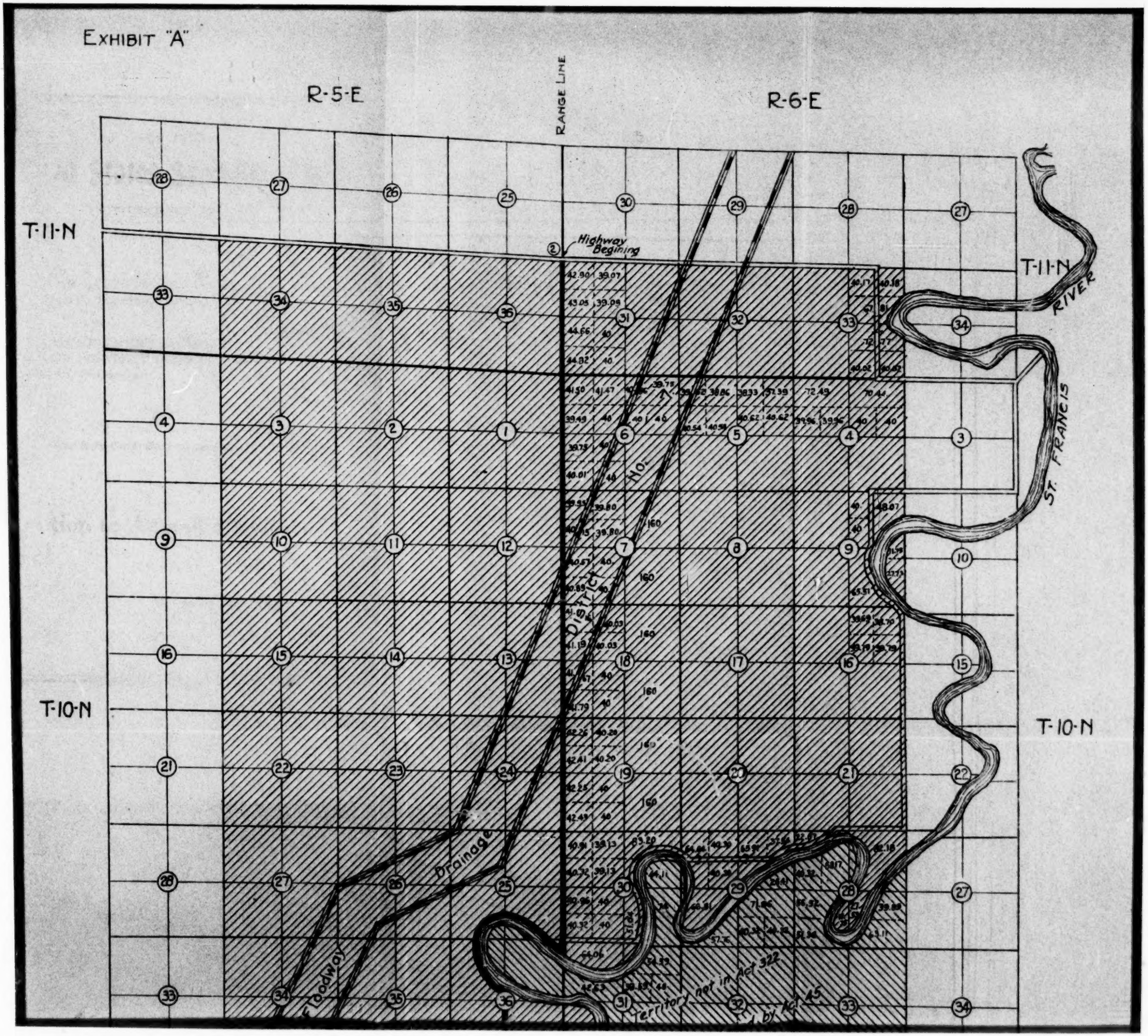
"Said proceedings and judgment shall be in the nature of proceedings *in rem*."

(See page 60, Appendix to petitioner's brief). This would seem to strengthen the authority of the Kline case cited Supra as it is undisputed that the case brought in the United States District Court was a proceeding *in rem* and that the suit in the Chancery Court of Poinsett County was begun before the suit in the United States District Court.

We respectfully submit that the decree of the United States Circuit Court of Appeals Eighth Circuit must at least be affirmed under the authority of the unbroken line of decisions of this court.

J. F. GAUTNEY,
Of Counsel.

HENRY D. ASHLEY,
Attorney for Respondent.


EXHIBIT "A"
R-5-E
RANGE LINE
R-6-E
T-11-N
T-10-N
Highway Begining
RIVER
ST. FRANCIS
DISTRICT
No.
Drainage
Floodway
territory not in Act 322
by Act 45

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SUPREME COURT

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

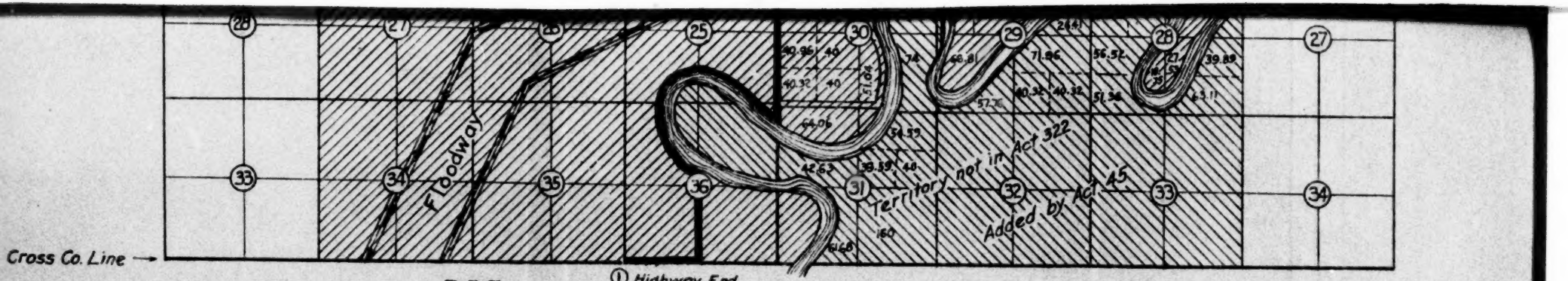
ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

Motion to Amend Judgment.

HENRY D. ASHLEY,
J. F. GAUTNEY,
Attorneys for Respondent.



CROSS COUNTY

MAP
SHOWING PROPERTY INCLUDED IN ROAD IMPROVEMENT DIST. No.7 POINSETT CO. ARK.

Aug. 13, 1921

Territory shown thus ▨ is land described in Amendatory Act No. 45, Extra Ordinary Session 1920, Approved Feby. 4, 1920.

Description of highway shown hereon as contained in Act 322, as amended by Act 45; Begining at N.E. Corner Sec. 36, T-11-N, R-5-E, thence South on Range line between Ranges 5-6 to bank of St. Francis River, thence along bank of river with meandering to center of Sec. 36 T-10-N, R-5-E, thence South to boundary line of said section, thence West on boundary line to line between Secs. 35, 36, T-10-N, R-5-E

All of territory embraced in Road Dist. No. 7 is in Drainage Dist. No. 7, formed prior to Road District No. 7, embracing in its boundaries (Drainage Dist. No. 7) approximately 165,000 acres of land.

Road district No. 7 territory embraces appraximately 26,880 acres, included in said territory is appraximately 3000 Acres condemmed and used by Drainage Dist. No. 7 as a floodway.

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

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MOTION TO AMEND JUDGMENT

Comes now Respondent and files this it's Motion to Amend the Judgment heretofore and on January 19th, 1925, rendered in the above entitled cause in the following particulars and for the following reasons:

1. Said judgment orders, *inter alia*, that the above entitled case be remanded to the District Court of the United States for the Eastern District of Arkansas.

Whereas, it is apparent from the opinion delivered by Mr. Justice Holmes on the same day as said judgment that the mandate in this case should be sent to the United States Circuit Court of Appeals, for the Eighth Circuit.

The final paragraph of said opinion reads as follows:

> "The respondent attempted to open the general merits of the case. If there is anything in the effort, which we do not imply, we shall leave that for further consideration below. The Circuit Court of Appeals regarded the case as stopped at the outset by want of jurisdiction. In that we think it erred.
>
> "Decree reversed."

The decree of the United States District Court for the Eastern District of Arkansas (see transcript, page 18), assuming the jurisdiction of said case, decided the entire case on its merits; upholding the validity of said Road District No. 7, upholding the validity of One Hundred and Twenty-five Thousand Dollars of so-called bonds issued by said Road District and ordering the receiver theretofore appointed by said United States District Court to proceed to collect the taxes and pay said bonds and interest.

On appeal of said case by Respondent to the United States Circuit Court of Appeals that Court reversed said decree solely on the ground that said United States District Court was without jurisdiction. (See 298 Federal, page 272.)

Thereafter this Court, having granted petitioner a writ of certiorari, on January 19th, 1925, delivered its opinion by Mr. Justice Holmes reversing the said United States Circuit Court of

Appeals solely on the ground that said Court erred in its holding that said United States District Court was without jurisdiction, and left the merits of this case "for further consideration below," without declaring whether the said United States District Court or said United States Circuit Court of Appeals was intended. The judgment, however, entered on said 19th day of January, 1925, above referred to remands this case to the United States District Court for the Eastern District of Arkansas.

The fact that said United States Circuit Court of Appeals has only passed on the question of jurisdiction leaving the correctness of said decree on the merits of the entire case unsettled, makes it evident, in order that complete justice may be done, and unnecessary expense and delay avoided, that the mandate in this case should issue to the United States Circuit Court of Appeals, and not to the United States District Court.

This Honorable Court in the case of *Brown* v. *Fletcher*, 237 U. S., page 583, decided in 1915, has passed on the exact question involved in this motion.

We beg leave to quote the final paragraph of the opinion of Mr. Chief Justice White concurred in by the entire Court in the case of *Brown* v. *Fletcher*, loc. cit. 237 U. S., page 588:

> "While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below, that is, the Circuit Court of Appeals, to the end that, all questions concerning its jurisdiction as a Federal Court having been determined by the prior decision of this court, it proceed to dis-

charge its duty of hearing and deciding the case conformably to law. Reversed and remanded for further proceedings consistent with this opinion."

Wherefore Respondent respectfully prays that said judgment of January 19th, 1925, be amended by ordering the mandate in this case to go to the United States Circuit Court of Appeals for the Eighth Circuit for further proceedings in conformity with the opinion of this Court.

HENRY D. ASHLEY,
Attorney for Respondent.

J. F. GAUTNEY,
Of Counsel.

I hereby certify that the foregoing Motion for Amendment of Judgment is, in my opinion, well founded, and is not made for the purpose of delay.

HENRY D. ASHLEY,
Attorney for Respondent.

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SUPREME COURT

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

Petition for Rehearing by Respondent.

HENRY D. ASHLEY,
Attorney for Respondent.

J. F. GAUTNEY,
Of Counsel.

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

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PETITION FOR RE-HEARING BY RESPONDENT

Comes now respondent and respectfully petitions this honorable court to grant a re-hearing and order a reargument of the above entitled cause for the purpose of preventing miscarriage of justice and for the following specific reasons:

First: The opinion of this court written by Mr. Justice Holmes is based primarily on the case of *Madisonville Traction Company* v. *St. Bernard Mining Company*, 196 U. S. 239. From the major-

ity opinion in that case rendered by Mr. Justice Harlin, Mr. Justice Holmes presents an able and vigorous dissent concurred in by Mr. Chief Justice Fuller, Mr. Justice Brewer and Mr. Justice Peckham, from which respondent concudes that Mr. Justice Holmes, the writer of the opnion in this case, does not agree with the opinion which he has written but merely submits to the opinion of the majority of the court in the above entitled cause.

Second: The other case on which the opinion of Mr. Justice Holmes is based, is *Road Improvement Dstrict No.* 2 v. *St. Louis Southwestern Railway Company,* 257 U. S. 547. The opinion in that case written by Mr. Chief Justice Taft, clearly demonstrates that the reasoning of that opinion has no application to the instant case. The administrative proceeding in the assessment of benefits in the instant case was never transferred to a court. No notice of the assessment of benifits was published as required by Act 322 and the validity of the assessment depends not upon a judicial proceeding, but upon a legislative approval of the assessment by special Act 45.

From the above it is apparent that the opinion of Mr. Justice Holmes in this case in fact overrules two important cases, *Meriwether* v. *Garrett,* 102 U. S. 472, and *Thompson* v. *Allen County,* 115 U. S. 550, and is a clear invasion by the judiciary of the Federal Government of the legislative functions of the State of Arkansas.

Three: Because the United States District Court in its decree undertook to make a new and independent assessment of benefits, thereby invading the legislative functions of the State of Arkan-

sas and overriding the provisions of clause eight of Act 322 under which the Road District in controversy was created, said section eight providing as follows:

> "The commissioners may, not oftener than once a year, reassess the benefits in said district; but in the event the district shall have incurred an indebtedness or issued bonds, the total amount of the assessed benefits shall never be diminished."

The decree of the United States District Court providing *inter alia* as follows:

> "But in view of the fact that only $125,000 of said bonds will be outstanding, the rate of taxation fixed at the time of the issuance of said bonds will be reduced 2% upon the assessment of benefits in each of the years 1922 to 1924 inclusive, and 3.2% of the amount of the assessed benefits for each of the years 1925 to 1941 inclusive."

Even though it be conceded for the purpose of the argument that United States District Court (there being diversity of citizenship) might have jurisdiction to foreclose a mortgage, the decree rendered in the instant case was solely for the collection of these assessments by a Receiver appointed by the Federal Court. This was done in defiance of the plain provisions of the constitution of the United States and of the State of Arkansas, dividing both the Government of the United States and the State of Arkansas into its three coordinate departments, legislative, executive and judicial, and in defiance of the long line of decisions of this Court and especially of the decision of this

Court by Mr. Justice Miller in the case of *Thompson* v. *Allen County*, 115 U. S. 550.

Four: Because the Court in its opinion by Mr. Justice Holmes has entirely ignored the case of *Kline* v. *Burke Construction Company*, 206 U. S. page 226, decided November 20th, 1922, opinion by Mr. Justice Sutherland.

WHEREFORE, Respondent, petitioner herein, respectfully asks the Court to reconsider its judgment of reversal, and to grant a reargument of this case. Respondent, petitioner herein, further prays the Court to recall the mandate heretofore sent by it to the United States Circuit Court of Appeals for the Eighth Circuit.

HENRY D. ASHLEY,
Attorney for Respondent.

J. F. GAUTNEY,
Of Counsel.

I hereby certify that the foregoing petition for a re-hearing is, in my opinion, well founded, and is not made for the purpose of delay.

HENRY D. ASHLEY.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1924.

GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, *v.* ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 389. Argued January 8, 1925.—Decided January 19, 1925.

When state legislation has authorized and confirmed assessments of benefits on lands of a special improvement district and the mortgaging of these taxes as security for bonds to be sold to the public, and has provided in terms for collection of the taxes through a receiver to be appointed by a state court to pay the bonds in case of default, and the bonds are bought by the public upon this assurance, the power thus conferred upon the state court may be exercised by the federal District Court, in a suit to foreclose the mortgage in which jurisdiction otherwise exists through diversity of citizenship. P. 6.

298 Fed. 272, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court and directed that the bill be dismissed. The decree of the District Court was made in a suit brought by a trustee for bondholders, alleging diversity of citizenship, against a road improvement district, to foreclose a mortgage covering the assets of the district, including assessments for benefits already made and confirmed against the lands of the district. The decree directed a receiver to collect these taxes to the extent necessary to pay outstanding bonds and coupons.

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Mr. G. B. Rose, with whom *Mr. D. H. Cantrell*, *Mr. J. F. Loughborough* and *Mr. A. W. Dobyns* were on the briefs, for petitioner.

The question is whether the statute creates a substantive right, or whether it deals merely with a remedy. If a substantive right is given, it will be enforced in the federal courts, according to the practice established in those tribunals. If only a remedy is given, unknown to federal jurisdiction, that remedy must be sought in the state courts.

Along with every mortgage there goes the right to the appointment of a receiver, where that course is essential to the protection of the mortgagee's interests. An improvement district is merely a creature of the Legislature, and the Legislature can impose upon it such liabilities as it deems fit. The Legislature has provided that so long as there is no default in the payment of the bonds, the property owners shall have a right to pay their taxes through the county collector. It has provided also that in case of such default the taxes shall be collected by a receiver appointed by the court on the application of the bondholders. That this right to the appointment of a receiver is a substantive one of the greatest value must be apparent to this Court, from its long and painful experience in matters of mandamus against public corporations.

By the terms of the statute creating the district, the bondholders were solemnly assured that if there should be default for thirty days in the payment either of principal or interest of the bonds a receiver would be appointed. It was upon the faith of this assurance that they bought the bonds. The law under which an obligation is issued enters into it and forms a part thereof, as completely as if fully set forth therein. It would be monstrous to hold that this solemn promise held out to the bondholders as an inducement to buy the bonds did not confer upon them

a substantive right which will be enforced by the federal courts.

This is particularly the case because the appointment of a receiver in a suit to foreclose a mortgage lien is a part of the ordinary equity jurisdiction of the federal courts; so that there is no attempt in the state statute to grant a remedy unknown to those courts, but merely to create a right which those courts will enforce in the manner provided by their rules and the practice in chancery.

What are substantial remedial rights is illustrated by numerous decisions of this Court. *Holland* v. *Challen*, 110 U. S. 15; *Devine* v. *Los Angeles*, 202 U. S. 313; *The Case of Broderick's Will*, 21 Wall. 503; *Ellis* v. *Davis*, 109 U. S. 485; *Farrell* v. *O'Brien*, 199 U. S. 89; *Sutton* v. *English*, 246 U. S. 199; *Gormley* v. *Clark*, 134 U. S. 338; *Louisville & N. Ry. Co.* v. *Western Union Tel. Co.*, 234 U. S. 370; *Reynolds* v. *Crawfordsville Bank*, 112, U. S. 405; *United States Mining Co.* v. *Lawson*, 134 Fed. 769, 207 U. S. 1.

This case comes exactly within the principle of the exception laid down in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491. See also *Butz* v. *City of Muscatine*, 8 Wall. 575; *Bronson v. Kinzie*, 1 How. 311; *Howard* v. *Bugbee*, 24 How. 461; *Barnitz* v. *Beverly*, 163 U. S. 118, *Sheffield* v. *Witherow*, 149 U. S. 574.

Mr. Henry D. Ashley, with whom *Mr. J. F. Gautney* was on the brief, for respondent.

United States courts will not assume all jurisdiction that the State courts could assume. *Heine* v. *Board of Levee Commissioners*, 19 Wall., 655.

The right to have a receiver appointed for the purpose set out in the Act is not substantive but is purely remedial. No court has an inherent right to appoint a receiver to collect or levy taxes.

The right to levy and collect taxes can only be acquired by express delegation from the legislative body and can be exercised by no other body or person than the one designated by the Legislature.

The appointment of the receiver to levy and collect taxes is not on account of the equity powers of the Chancery Court of Poinsett County, but on account of an express delegation from the Arkansas Legislature. The right, therefore, is purely remedial and is not substantive so as to be administered by any other court.

The court erred in exercising jurisdiction herein, the Chancery Court of Poinsett County having first acquired jurisdiction. *Kline* v. *Burke Construction Company*, 260 U. S. 226.

A proceeding had in a proper court for the laying out of a public road is in the nature of a proceeding *in rem* and binds all the world. *Milcreek Tp.* v. *Reed*, 29 Pa. St. 195; *Farmers Loan & T. Co.* v. *Lake St. Elevated*, 177 U. S., 51.

Section 13 of Act 322 provides that the Board of Commissioners shall enforce the collection by chancery proceedings in the Chancery Court of Poinsett County in the manner provided by Sections 23 and 24 of Act 279. Sec. 23 provides "Said proceedings and judgment shall be in the nature of proceedings *in rem*."

The case brought in the United States District Court was a proceeding *in rem* and the suit in the Chancery Court of Poinsett County was begun before the suit in the United States District Court.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the petitioner against Road Improvement District No. 7 of Poinsett County, Arkansas. It alleges that the District was organized under acts creating the District and in the second

statute confirming the District's assessment of benefits; that after the assessment the District issued its negotiable bonds, as authorized by the acts; that the bonds are in the hands of innocent purchasers for value before maturity; that, as also authorized, the bonds are secured by a mortgage of the assessments and all other assets of the District, to the plaintiff as trustee for the bondholders; and that by the terms of the acts after a default for more than thirty days in payment of interest or principal, a receiver shall be appointed to take charge of the affairs of the District. A default is alleged and is explained by a decree of the Chancery Court of Poinsett County that set aside the assessment securing the bonds and enjoined the District from paying any money belonging to it. The plaintiff and the bondholders were not parties to the suit and the decree saved their rights, but of course it prevents their getting any payment until they are relieved. The District Court made a decree for the plaintiff and directed a receiver appointed by it to collect the taxes theretofore levied to the extent necessary to pay the outstanding bonds and coupons. The Circuit Court of Appeals held that the District Court had no jurisdiction and ordered the bill to be dismissed. 298 Fed. 272.

The acts from which the District got its existence and power were Act No. 322 of the State for 1919, and Act No. 45 of the Acts of 1920, the second being an amendment of the first and a declaration and enactment that the assessments of benefits have been made and are confirmed. The plan of the first was that the assessment should be made at the outset and that thereupon the county court should enter an order 'which shall have all the force of a judgment' that there should be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement with ten per cent. added, in the proportion of the benefits, to be paid in annual instalments, not to exceed ten per cent. for any

one year. The tax is made a lien upon the land and in this way a security is created and the statute allows it to be mortgaged, as was done in this case. If any bond or coupon is not paid within thirty days of its maturity it is made the duty of the Chancery Court of Poinsett County to appoint a receiver to collect the taxes and pay what is due, and power is given to direct the receiver to foreclose the lien on the lands.

The ground on which jurisdiction was denied by the Circuit Court of Appeals was that the power to levy and collect taxes was a legislative function of the State which could not be usurped by a federal court. But while that may be true as a general doctrine, it cannot apply when a State has authorized and confirmed an assessment and a mortgage of it as security for bonds that the public is invited to buy, and has provided in terms for a collection by a receiver appointed in equity if there should be a default. There is no longer any legislative act to be done, and there is no usurpation of powers in following the course provided by state law. It seems to be recognized in *Meriwether* v. *Garrett*, 102 U. S. 472, that a receiver might be appointed by a Court of Chancery when that remedy was contemplated by the contract, as it fairly may be said to have been contemplated here. The subject matter of the mortgage and the possible foreclosure of the lien require the intervention of such a Court if right is to be done. In the argument before us there was some suggestion that the chancery power was confined to the state court named in the statute. But the decisions have done away with such a limitation and it was not relied upon by the Circuit Court of Appeals. *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239; *Road Improvement District* v. *St. Louis Southwestern Ry. Co.*, 257 U. S. 547, 555. The state law is not merely an enlargement of the remedial powers of a local court as in *Pusey & Jones Co.* v. *Hanssen*, 261

U. S. 491, it recognizes the inadequacy of the remedy at law and is an attempt to give to purchasers of bonds the assurance of adequate relief against shortcomings that experience has taught the business world to apprehend. We see no reason why it should not succeed. *Campbellsville Lumber Co.* v. *Hubbert*, 112 Fed. 718. *Stansell* v. *Levee Board*, 13 Fed. 846. *Supervisors* v. *Rogers*, 7 Wall. 175.

The respondent attempted to open the general merits of the case. If there is anything in the effort, which we do not imply, we shall leave that for further consideration below. The Circuit Court of Appeals regarded the case as stopped at the outset by want of jurisdiction. In that we think it erred.

Decree reversed.